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In The

SUPREME COURT OF THE UNITED STATES

Caren Tidwell
Petitioner/Involuntary Pro'se Litigant,

vs.

BellSouth Telecommunications, Inc.
Respondent,

On Petition for Writ of Certiorari
To The Eleventh Circuit Court of Civil Appeals
Case Number 01-14239-AA

On Appeal from the United States District Court
For the Northern District of Alabama
Case Number CV 00-1197

PETITION FOR A WRIT OF CERTIORARI

Caren Tidwell*
3300 Casey's Crossing
Birmingham, Alabama 35215
(205) 681-1621
*Involuntary Pro'se Litigant
and
The Petitioner

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88 pp

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3300 Casey's Crossing
Birmingham, Alabama 35215
(205) 681-1621
*Involuntary Pro'se Litigant
and
The Petitioner

QUESTIONS PRESENTED FOR REVIEW

Question #1: "Can an employer deny STD/LTD (Short Term Disability/Long Term Disability) benefits because they claim that the employee should be at work in a light or modified duty job, and then deny the employee access to the company's property in an attempt to prevent the employee from performing the offered light or modified duties in order to deny benefits?

Question #2: "Can an employer attempt to retroactively terminate an employee's employment to a date prior to the date that the employee became ill or injured, in an attempt to prevent the employee from applying for benefits?"

Question #3: "Can an employer maintain in one action (this Federal Court case) that the employee is not disabled in order to deny disability benefits and then at the same time take the position that she is disabled in another Civil Action (Alabama State Court) to minimize their damages, claiming that the employee was disabled and not entitled to lost wages due to her disability?

INFORMATION ALLOWED TO ACCOMPANY THE QUESTIONS PRESENTED SO QUESTIONS CAN BE UNDERSTOOD

In any proceeding in this Court in which the constitutionality of an Act of Congress is drawn into question or a question of first impression, the initial document filed in this Court shall recite that *28 U.S.C. § 2403* (a) may apply and shall be served on the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, NW, Washington DC 20530-0001.

Since this Petitioner is an Involuntary Pro'se Litigant that has been denied her rights to counsel and openly admits that she is ignorant to proper procedure, she was unsure if her questions of first impression require being served on the Solicitor General. Being overly cautious, the required number of copies was sent to the Solicitor General and also the required numbers of copies have been served to opposing counsel as required per your instructions.

A Motion has been filed requesting leniency that is allowed by Rule and Law in extraordinary cases such as this one just in case this Involuntary Pro'se Litigant makes an error formatting her Petition. She prays that this Court will take into consideration that she is sincerely attempting to follow all of the complicated rules but this has been extremely difficult considering she has no legal guidance or counsel, has a 12th grade education, and has no other choice if she is to attempt to claim what was rightfully hers in the first place.

These questions were presented to the United States Court of Civil Appeals, Eleventh Circuit is located in the Brief of the Appellant, Page F and before the District Court, questions 1 and 2 appear in the Plaintiff's Opposition to the Defendant's/Respondent's Motion for Summary Judgment and Questions 1, 2, and 3 appear in a Post Trial Motion to Reconsider, Set Aside Judgment, Alter and Amend filed by the Plaintiff/Petitioner. The only reason question # 3 was

not posed to the District Court is because it was an event that had not occurred. This newly discovered change in this Respondent's position occurred after the Appeal was in process. The three questions asked are copied and presented on page one and in the Body of this Petition.

The Questions presented for review are expressed concisely in relationship to the circumstances of this particular case. Not only do the facts and circumstances affect this Petitioner, it has the potential to affect many present and future sick, injured, and disabled employees (See example on page ss). If these questions are not answered and this and other employers are allowed to "get away with" these deplorable tactics, a great injustice will persecute many future disabled, sick, or injured employees. This was never was the intent of its Legislation or the Law.

Also shown in the Brief of the Appellant, Beginning at Page 21, "The District Court was misled by an administrative record that did not represent the actual facts and the administrative record did not reflect what was actually occurring." (which is in violation of *29 U.S.C. § 1141*). Since the Plan's Administrators failed to prevent this Petitioner from filing a claim for her STD/LTD benefits with their scheme to retroactively terminate her employment to a date before her disability began (which is in violation of *Section 510 of ERISA, 29 U.S.C. § 1140*), the Plan Administrators then denied her access to the company's property preventing her from performing the offered and available "light or modified duties" and then denied her claims because she was not at work to perform the offered and available modified duties because they denied her access to the company's property (which is in violation of *Section 510 of ERISA, 29 U.S.C. § 1140* and *29 U.S.C. § 1141*). This is confusing and this confusion is a clever but unethical tactic to deceive the "reviewing committee" (the "reviewing committee" was only informed that Tidwell did not show up to perform the available and offered "light or modified"

duties but they were never informed that Tidwell was denied access to the company property where the "light or modified duties" could be preformed (which violated her rights to a "full and fair" review - *29 U.S.C. § 1133 (2)*. This is also a tactic to deceive the Courts and is further explained in the "Statement of the Case" included in this Petition. This Respondent made it impossible for the Petitioner Tidwell to comply. Research performed shows that there has not been a situation such as this and there is no state or federal opinion that answers this important question. This leads to the first Question of First Impression – "Can an employer deny STD/LTD benefits because they claim that the employee should be at work in a light or modified duty job, and then deny the employee access to the company's property in an attempt to prevent the employee from performing the offered light or modified duties in order to deny benefits?

As shown in the Brief of the Appellant, page 22, another extremely important factor is that these Plan Administrators were creating an administrative record that did not represent the actual facts and the record did not reflect what was occurring (*29 U.S.C. § 1141*). Tidwell has already shown the Court the fabricated dates, among other issues, and these tactics are further explained in the Statement of the Case included in this Petition and a full account is contained in the Record on Appeal in this case. However, one very important note is that during the denial benefit period of April 25, 1996 though the fabricated date of May 10, 1996, the Plan Administrators were sending Tidwell letters stating that her benefits were being denied because she should show up for work in light or modified duty. First, the benefits were denied because the Plan Administrator withheld evidence that supported her position and the "reviewing committee" did not have the opportunity to evaluate all of the evidence submitted by Tidwell which is in violation of *29 U.S.C. § 1133 (2) – Full and Fair Review*. Secondly, due to the attempted retroactive termination

(which is explained fully below and in the Statement of the Case) no one knew if Tidwell was still on the payroll. The Plan Administrators wanted to prevent Tidwell from even filing for the STD/LTD Benefits (that is why they selected an attempted retroactive termination date to the date 4 days before Dr. Faulkner discovers the devastating damage to her spine, confirmed by hospital diagnostic testing - this becomes important because the attempted retroactive termination date selected by the Plan Administrators was 4 days before the Social Security Administration's awarding her total and permanent disability benefits.) (This violated *29 U.S.C. § 1141, Section 510 of ERISA, 29 U.S.C. § 1140).*

This leads to the second question of first impression. Research performed shows that there has not been a situation such as this and there is no state or federal opinion that answers this important question.

Question #2: "Can an employer attempt to retroactively terminate an employee's employment to a date prior to the date that the employee became ill or injured, in an attempt to prevent the employee from applying for benefits?"

As we were discussing, these Plan Administrators were writing her denying benefits because she should be at work in light or modified duty job but she had been informed that she had been retroactively terminated and that she was not to come on the company property and could not show up under any capacity. Now how can Tidwell be at work in a light or modified duty job when she had been fired and advised that she was not to step on the company's property? This denied Tidwell access to her job *(29 U.S.C. § 1141, Section 510 of ERISA, 29 U.S.C. § 1140).*

Because it was a new development, the fact that this Respondent went to State Court and argued that Tidwell was disabled at the time of her termination, 3 weeks after they had taken a totally opposite position before the District Court was not raised before the District Court because it had not happened at that time, however, this newly discovered position asserted by this Respondent after the District Court

made it's ruling. This was brought before the Court of Appeals and is discussed in the Brief of the Appellant, page 21 and is basically self explanatory. The third question of first impression is Question #3: "Can an employer maintain in one action (this Federal Court case) that the employee is not disabled in order to deny disability benefits and then at the same time take the position that she is disabled in another Civil Action (Alabama State Court) to minimize their damages, claiming that the employee was disabled and not entitled to lost wages due to her disability?

Now why are the above three questions important for this Court to answer? This is fully explained in the body of the Petition as required. Examples are given in the body of the Petition that will help explain the adverse effects of this type of conduct being continued and allowed by the Courts. If the Courts allow this defendant to prevail if this case, it would set up a situation similar to the one described below titled ADVERSE EXAMPLES IN AFFIRMING THIS RULING (This example was brought before the trial court in the Plaintiff's Opposition to the Defendant's Motion of Summary Judgment and it was also presented to the 11th Circuit Court of Appeals). These questions were left unanswered, unresolved, and errors of the Court uncorrected.

An employee goes to the doctor and is told that he has cancer (Tidwell had an undisputed work related injury and not cancer but for the sake of easier understanding, Tidwell will use cancer as the disability). At the time of this examination, the doctor does not know how serious the cancer is because further tests are needed. The employee has been under the care of company physicians for months but all requested testing was denied. The company doctor sends the employee to his partner because cancer is not his specialty and he knows that he is not qualified to give the care that this cancer patient will need. The employee is examined by the other doctor and he finally does do medical testing. The test results come in and the employee calls to

tell the supervisor that he is very sick but he still wants to work and that he is just trying to recover to be able to come back to work. The doctor sends a note to the company stating that the employee is off work and under his care. The supervisor notifies the various departments of the situation. The employer suddenly retroactively terminates the employee to a date a few days before the medical testing was done, even though several weeks had already passed. The Benefit Department "makes up a date" that the employee's first date of absence would begin, a few weeks after the employee was no longer working due to the illness. The Benefit Department then sends letters to the employee stating that he would not be paid because he should have been at work in a light duty position (even though he was fired and they were telling him that he could not come to work under any circumstances) and the doctor had sent notice that he could not return to work at that time. The terminated employee then starts the appeals procedure and submits medical and other evidence. The employee files a lawsuit. All of the evidence that the employee submits to the "self funded" "self administrated" and "self policed" Plan Administrators does not make it to the "Review Committee" and the employee is not allowed to attend the review meetings. The employer relies on the company physician's medical reports that had refused to provide the requesting medical testing, even though now he has admitted in a deposition that he did not even examine the part of her body damaged. In addition, documents that were submitted to the Plan Administrators by the employee that strongly supported her position and evidence showing that her physician had removed her from work for treatment, seemed to disappear somewhere between the Benefit Manager's desk and the "reviewing committee". The employee realizes that not all of the medical information that he submitted is considered, however, the employee still is not allowed to attend the determination committee

meetings. The employee has a disability determination is classified as disabled several months after termination and Social Security Disability Payments are granted retroactive back to the last day that the employee worked (April 4, 1996 and the first visit to the cancer specialist that finally ran the appropriate medical testing and not the date that the Benefit Department "pulled out of thin air").

This is exactly what happened to this Petitioner, Tidwell, except she had a worker's compensation dispute instead of cancer. She has been schemed out of any and all benefits, including the worker's compensation benefits that she was rightfully entitled to. There is no way that the above can be construed as reasonable, rational, and/or justified. This is cruel and their actions and lack of actions are inexcusable. All of the facts above were known to the administrators at the time of their decisions; they just failed to inform the reviewing committee of the "whole truth". There is no way that any Court would believe that this would be rational, reasonable, or correct and it is obvious that there was improper motive and bad faith.

LIST OF PARTIES

Alexander
Mr. Craig Alexander, Attorney for BellSouth

BellSouth - The Defendant/Appellee/Respondent
BellSouth Telecommunications, Inc.
BellSouth Affiliated Companies
BellSouth VISA

Clemons
The Honorable Chief Justice U.W. Clemons
Judge Presiding over the District Court Alabama

Glenister - Counsel of Record for the Respondent
Mr. Jim Glenister, Attorney for BellSouth
Counsel of Record for the Respondent
BellSouth Legal Department
1100 Peachtree Street
Suite 1400
Atlanta, Georgia 30309
Telephone #: (404) 249-5269

The Firm of Lange, Simpson, Robinson, & Somerville
Contracted by BellSouth, see Alexander above

Tidwell - The Plaintiff/Appellant/Petitioner
Caren Jane Jennings Tidwell
Involuntary Pro'se Litigant

United States Court of Civil Appeals - Eleventh Circuit
The Honorable Judge Black
The Honorable Judge Carnes
The Honorable Judge Marcus

*A Corporate Disclosure does not apply to this Petitioner.

TABLE OF CONTENTS

Questions Presented For Review _____ i

Information Accompanying the Questions Presented So the Questions Can Be Understood by this Court _____ ii - viii

List of the Parties_____ ix

Table of Contents _____ x - xii

Table of Authorities_____xiii - xvi

Opinions Below_____ 1

Statement of the Basis for Jurisdiction_____ 1

Constitutional & Statutory Provisions Involved_____ 2
See Appendix and Table of Authorities For Full Citations

Statement of the Case_____ 2 - 13

Reasons for Granting the Writ/Petition

1) The three questions of first impression need to be answered by this Court to inform employers that there are boundaries in determining ERISA Claims __ i, 23, 24, 25,

2) Question # 1 _____ i, 23,

3) Question # 2 _____ i, 24,

4) Question # 3_____ i, 25,

5) Example of Adverse Effects if this Court Affirms this Respondent's Summary Judgment, not only for this Litigant but for thousands of present and future injured, sick, and/or disabled employees__ iv-viii, 26,

6) Example of Adverse Effects if this Court Denies this Petitioner's valid issues presented or denies this Petition only stating "Writ Denied" "No Opinion"_ 3, 13, 14,

7) The Petitioner did not have a "full and fair" review _____iv, 15, 16, 17, 18, 26, 28, 29,

8) The Respondent violated their fiduciary duties _____xi, 3, 14, 17, 18, 27, 28, 30,

9) An Error by the Clerk in Birmingham caused the 11th Circuit to exclude evidence that was in the Record on the Petitioner's behalf____ 20, 21, 22, 30,

10) The 11th Circuit misinterpreted FRAP and excluded Reviewing the Post Trial Motions and the Petitioner was entitled to have reviewed_____ 21, 22, 30,

11) The District Court Erred by Basing its Judgment on the Incorrect Administrative Review Dates, Thereby Excluding evidence that should have been reviewed and this excluded evidence strongly supported the Petitioner's position _____21, 26, 29, 30,

12) The District Court Erred by Basing Its Judgment on a "fabricated administrative" record or withholding evidence _____iv, vii, 9, 11, 12, 18, 22, 26, 27,

13) The District Court Erred by Basing its Judgment on how The Fiduciary adopted a different interpretation of "The Plan"_____ 16, 19, 30,

14) Clerical Error made by a clerk in Birmingham, Alabama Which omitted attachments on the docket sheet thereby causing the District Court and the 11th Circuit to improperly exclude evidence that was properly in the record and should have been considered on the Petitioners behalf.....21, 22,

15) This Petitioner has been denied her rights to legal guidance and counsel and is an Involuntary Pro'se Litigant who openly admits that she is struggling to follow the complicated rules _____ i, ii, 2, 9, 12, 13, 16, 17, 19,

16) This Respondent's credibility is questionable in this case and they have a "history" which involves their lack of Credibility due to their deceit and "conflict of interest _____ xiv, 12, 14, 15, 16, 17, 28, 30, App. G

Conclusion _____ 30

TABLE OF AUTHORITIES

CASES PAGE

Barbour v. Merrill,
48 F.3d 1270, 1277 (D.C.Cir. 1995) 16

Bruno v. BellSouth,
701 So.2d 1056 (La. App. 5 Cir. 1997) 17

Chapman v. AI Transport,
Nos. 97-8838, 97-9086 and 97-9269,
(11th Circuit, July 13, 1999) 27

"Although this evidence does not rebut directly AIGCS's allegations regarding Chapman's interviewing skills, the plaintiff's ability to call into question the credibility of the defendant's stated objective criteria presented to explain its business decision is, at the summary judgment stage, sufficient to cast doubt on the defendant's subjective justifications as well." *See Combs,* 106 F.3d at 1537 ("A defendant who puts forward only reasons that are subject to reasonable disbelief in light of the evidence faces having its true motive determined by a jury."). "Nonetheless, where, as here, the employee has established a prima facie case *and* cast sufficient doubt on the credibility of subjective explanations that are *not* susceptible to evidentiary support or capable of objective evaluation by this court, we believe that summary judgment is not appropriate." As quoted in *Chapman v. AI Transport,* Nos. 97-8838, 97-9086 and 97-9269, United States Court of Appeals, Eleventh Circuit, July 13, 1999.

Combs,
106 F.3d at 1537 27

Godfrey v. BellSouth
No. 95-6480. (11th Cir. 1[illegible]) .....App. G, 14, 15
FRAP Rule 14 (v) and (vi) allows this case to be placed in the Appendix. *This cited case involves this Respondent. The same decision makers in this case are the same decision makers in the Petition at hand. These "decisions" were also about the same time - This should automatically call this Respondent's credibility into question, thereby by Law, the Respondent being granted summary judgment should be reversed. *Some provisions involved are lengthy, so their citations have been included in the appendix as allowed per your instructions. Since this case involves the same "self funded" "self administrated" "self policed" Plan Administrators, the entire case is in Appendix G App. 18 for the Court's viewing.

Hackman v. Valley Fair,
932 F.2d 239, 241 (3d Cir. 1991) 17

Hayes v. Muller,
Memorandum Opinion at 2 n;
(Citing Hayes v. Muller,
No. CIV. A. 96-3420, 1996 WL 583180,
At *2 (E.D. Pa. Oct. 10, 1996) 17

Jordan v Gilligan,
500 F2d 701 at 707
(6th Cir ND Ohio 1974) 22

**Levinson*.....
Levinson v. Reliance Standard Life Insurance Company
(U.S. 11th Circuit) No. 00-11187, Docket # 97-00935-CV
"The district court also gave less weight to Myerburg's testimony, as he was a reviewing physician, and not a treating physician or examining physician." The court

cited *Donaho v. FMC Corp.*, 74 F.3d 894, 901 (8th Cir. 1996), to support this conclusion. The court concluded that any administrative decision that Levinson was no longer disabled would "lack] support in the record' and would be "so overwhelmed by contrary evidence, the administrative decision [would be] unreasonable and [would] not stand." *Id.* In *Donaho*, however, the Eighth Circuit instructed the district court to remand the case to the administrator, requiring the "administrator to acknowledge liability at least until October 1, 1993, and for such additional time as the record may show that Donaho's condition remained the same or worsened after October 1993. The administrator of the plan should permit additional evidence to determine the duration of the disability, if any, following October 1, 1993." *Id.* at 901-02. "Our review of the record does not disclose any additional evidence that would indicate Levinson has ceased to be disabled under the terms of the plan."....."We review this factual finding for clear error."_____ 20, 21, 22, 23, 26, 27

Marecek v. BellSouth

No. 93-6170. (11th Cir. 1996) 14, 15, 16

FRAP Rule 14 (v) and (vi) allows this case to be placed in the Appendix.

*This cited case involves this Respondent. The same decision makers in this case are the same decision makers in the Petition at hand. These "decisions" were also about the same time - This should automatically call this Respondent's credibility into question, thereby by Law, the Respondent being granted summary judgment should be reversed. This case even states that this Respondent arbitrarily and capriciously denied Appellee's claim and reviewed the class members' claims. This Petitioner was one of the employee's that the 11th Circuit questions whether the review of the members was fair. The abuse of this Respondent in this case

led to them being the only employer that did not survive ANY standard of review when it made their factual findings while reviewing its beneficiary's claims. This Petitioner is one of those beneficiaries.
*Some provisions involved are lengthy, so their citations have been included in the appendix as allowed per your instructions. Since this case involves the same "self funded" "self administrated" "self policed" Plan Administrators, the entire case is in Appendix G for the Court's viewing.

Simpson v. Horn,
No. Civ. A. 95-8028, 1998 WL 559802 at *2
(E.D.Pa. Aug. 31, 1998) 17

Varity Corp. v. Howe,
116 S. Ct. 1065 (1996) 18, 28

Welch v. Celotex Corp.,
951 F.2d 1235, 1237 (11th Cir.1992) 16

Wildbur,
974 F.2d at 639 (emphasis added);
Also see *Moore,* 993 F.2d at 102 ..... 18, 28

STATUTES

28 U.S.C. § 1254 (1)
Employee Retirement Income Security Act (ERISA),
29 U.S.C. § 1001-1461,
29 U.S.C. § 1132(a)(1)(B)
ERISA Sections 502(a)(1)(B) and (a)(3),
Section 510 of ERISA, 29 U.S.C. § 1140.
29 U.S.C. § 1132(a)(3)
ERISA Sections 502(a)(1)(B) and (a)(3)
Section 510 of ERISA, 29 U.S.C. § 1140.

29 U.S.C. § 1132(a)(1)(B) and § 1132(a)(3).
ERISA Sections 502(a)(1)(B) and (a)(3),
Section 510 of ERISA, 29 U.S.C. § 1140
29 U.S.C. § 1132(a)(1)(B) and (a)(3)
Section 510 of ERISA, 29 U.S.C. § 1140
ERISA Sections 502(a)(1)(B) and (a)(3), 29 U.S.C. § 1132(a)(1)(B) and § 1132(a)(3).
ERISA Sections 502(a)(1)(B) and (a)(3), 29 U.S.C. § 1132(a)(1)(B) and (a)(3). Section 510 of ERISA, 29 U.S.C. 1140
29 USA Section 1133 (2)
29 U.S.C. § 1140
29 U.S.C. § 1141 Coercive interference

IN THE SUPREME COURT OF
THE UNITED STATES OF AMERICA
PETITION FOR WRIT OF CERTIORARI

The Petitioner Caren Tidwell respectfully prays and petitions for a writ of certiorari to answer the questions of first impression and to review the rulings and judgments below from the United States District Court for the Northern District of Alabama and the United States Court of Civil Appeals, Eleventh Circuit. (App. 1 through App. 15)

OPINIONS BELOW

The Opinion of the United States District Court for the Northern District of Alabama, Case Number CV 00-C-1197-S, appears at Appendix C – Petitioner Timely Filed Post Trial Motions, With Attachments - Motions Denied – Premature Appeal was Filed – Docket Item #'s 31, 32, 33, 37, 43, 44, 45, 47, Denied on 08/28/01 and 08/29/01 (App. 9), Appendix D - Motion of Summary Judgment was Granted to the Respondent, Memorandum Opinion Entered on July 2, 2001, Docket Item # 29 (App. 10 – 14), & Appendix E – Summary and Final Judgment Granted on Motion of Summary Judgment to the Respondent in Separate Order on July 2, 2001, Docket Item #30 (App. 15). NOT PUBLISHED. The Opinion of the United States Court of Civil Appeals, Eleventh Circuit dated July 24, 2002, # 01-14239-AA, appears at Appendix B (App. 4–8) and was NOT PUBLISHED. The Denial of the Petitioner's Application for Rehearing by the United States Court of Civil Appeals, Eleventh Circuit dated October 8, 2002, appears at Appendix A (App. 3). NOT PUBLISHED.

STATEMENT OF JURISDICTION

This Petition is sought for review from Federal Court. A Motion of Summary Judgment was entered in favor of the Defendant/Respondent, BellSouth on July 2, 2001. On July 23, 2001, the Petitioner (Plaintiff) Tidwell filed an Appeal with the 11th Circuit Court of Civil Appeals after all post trial motions were denied. The date that the United States Court of Appeals decided my case was on July 24, 2002. I timely filed an Application for Rehearing, however, my Application

for Rehearing was denied on October 8, 2002. A copy of the order denying my request for rehearing appears at Appendix A (App. 3). This Petition was timely filed and was mailed by United States Certified Mail on or before Monday, January 6, 2003. Due to the fact that I am an "involuntary pro'se" litigant and can not obtain adequate representation, my original Petition was returned to be reformatted to the correct booklet size (Please see Appendix F, App. 16, for Motions filed which explains what has caused me to be unable to secure adequate counsel although I desired to be represented and for citings of Rule and Law that allow for leniency in extraordinary situations in which I have been forced into). I have openly admitted that I am ignorant to proper procedure and I am sincerely attempting to follow each and every one of your complicated Rules. This Petition has been resent and the deficiency was corrected to the best of my understanding and ability and was returned to this Court (or properly postmarked by United States Mail) within the time allowed by Law and the Rules of Procedure, and the instructions given to me by the Court Clerk (60 days allowed after notice dated March 24, 2003 or by May 23, 2003). Again a correction was needed and this corrected Petition was resubmitted to the Courts and timely filed according to the Clerk and was mailed on August 1, 2003. According to the instructions sent to me, the jurisdiction of this Court in my Petition is invoked under *28 U.S.C. § 1254 (*1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

See Table of Authorities and Appendix's Referenced

Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001-1461, 28 U.S.C. § 1254 (1), 29 U.S.C. § 1132(a)(1)(B), 29 U.S.C.§ 1132(a)(3), ERISA Sections 502(a)(1)(B) and (a)(3), 29 U.S.C. § 1133 (2), Section 510 of ERISA, 29 U.S.C. § 1140, 29 U.S.C. § 1141 Coercive interference and *The Fourteenth Amendment to the Constitution,*

STATEMENT OF THE CASE

This case involves many intentional acts of deceit, misrepresentations, and "bad faith" on the part of this

Respondent and the "reviewing committee" and the Courts have been deceived, which has resulted in this Respondent being improperly granted their Motion of Summary Judgment. The Petitioner Tidwell was severely injured on the job and was denied proper medical care for over 5 months after she was injured. She was caught in the "trap" of the Respondent being their own "self funded" "self administrated" and "self policed" fiduciary over their medical insurance, their worker's compensation insurance, and their other work benefits which included the STD/LTD, which is the subject for debate in this Petition. No Insurance Commission has any jurisdiction over this "self funded" employer, so the Courts are their only monitors overseeing the administrative decisions and tactics used to administrate their own Plans, which has an automatic built in "conflict of interest" and this Respondent has been reprimanded by the Courts on more than one occasion but the Respondent's improper conduct still continues. The Petitioner in this case was seen exclusively by company appointed physicians who "looked the other way" and did not offer any "real" medical treatment after her on the job injury. Tidwell had been severely injured but she could not even get approval for a simple lumbar x-ray and the company physician rendered an opinion regarding the injuries to her lumbar spine and this opinion was used against her in her worker's compensation hearing and in the "reviewing committee" assembled to determine whether or not Tidwell should receive her STD/LTD Benefits and other work benefits which is the relief available in this action. Although the Company physician's reports were used against her to deny her her entitled worker's compensation benefits, these reports were also sent to the "reviewing committee" and were considered by the committee which was to determine whether or not Tidwell received her STD/LTD Benefits. These reports did not reflect Tidwell's true medical condition and this company physician has now admitted in a deposition that he never even examined Tidwell's spine. How are the company physician's reports valid in this

Petition? Since Tidwell suffered an on the job accident, she was not allowed to go to an independent physician, so the medical reports reviewed by the reviewing committee several months prior to her extended absence was not an accurate account of her true medical condition. This Respondent had total control and they do not deny the many acts of bad faith that has occurred in this case because the Petitioner's assertions are what actually happened. The worker's compensation case, the retaliatory discharge case, and the ERISA case were tried in separate Courts. However, they are all connected to one another and to expose this Respondent's "bad faith" tactics, the portions of all three cases, as it related to the deceit involved in denying this Petitioner her STD/LTD benefits warrant a little discussion and is relevant to this Petition. The Petitioner's condition continued to deteriorate and she was referred to Dr. Faulkner by the company physician over 5 months after she had been severely injured (accident occurred on 10/30/95). Now the Court has to pay particular attention to this part of the statement of the case. The deceit and intentional maneuvers carried out by this Respondent are difficult to explain, especially without a personal presentation. Tidwell's worker's compensation accident was reported by this Respondent in October of 1995 as "No Lost Time" and she was forced to take vacation or personal holidays on days that she could not attend work due to the serious injuries from her on the job accident. On April 3rd, 1996, the Petitioner was finally sent to an orthopedic surgeon and a simple lumbar x-ray was finally performed (over 5 months after the accident had occurred). The physician read the x-ray and scheduled an MRI for the next day, which was April 4th, 1996. Tidwell went to work on April 4th (only worked part of the day because she was scheduled for hospital testing) and informed her supervisor that the physician had excused her from work for 6 weeks and she would be in physical therapy 4 sessions a week until approximately May 22, 1996. She turned in a physician excuse, left instructions for her co-worker on any of her passwords or incomplete

paperwork that would need to be handled during her absence (This Petitioner was a loyal employee and wanted to make sure that her duties were properly handled during her absence). Tidwell was still required to take her vacation or personal holidays but due to the seriousness of her injuries, she had taken almost 5 weeks vacation or personal time from January 1st to April of 1996. Here is one more example of how this Respondent deceives the Court's and the "reviewing committee" and the Department of Industrial Relations with regards to how many on the job injuries are really occurring at their place of employment. Tidwell was forced to take vacation or personal time for complications due to work related injuries or she would be terminated for poor attendance. The reviewing committee was never informed that Tidwell was struggling to work and that she had been forced to take almost 5 weeks of her own vacation or personal time because she was unable to attend work due to her severe injuries. On April 4th, 1996, the Petitioner was given an MRI and placed in physical therapy 4 sessions per week. The hospital test results where made know to the Petitioner Tidwell on April 18, 1996 and the news was not good. On Friday, April 19th, 1996, Tidwell called her supervisor and reported that the test results were in and the damage to her spine was severe and that she was to remain off work, she was to remain in intense physical therapy for six weeks, a "disability determination" was ordered because the damage was devastating and the surgeon did not know if Tidwell would ever return to work. Another physician statement excusing her from work was sent to the company. Dr. Faulkner even repeatedly sent the company statements that Tidwell's injuries occurred in the October 30, 1995 accident at their place of employment, not from any other accident nor was it from any pre-existing condition but his statements were ignored by BellSouth and never turned over to the "reviewing committee" which would decide whether or not Tidwell received her entitled benefits. Tidwell submitted these to the Plan's Administrators but these documents somehow never made it to the "reviewing

committee". Tidwell was advised to contact the Social Security Administration and set up an interview regarding Social Security Disability Benefits. As shown above, the Social Security Administration was contacted by the Petitioner Tidwell on (Friday) April 19, 1996, per her physician's instructions. Tidwell's supervisor was also contacted on (Friday) April 19th, 1996 with the devastating test results, news of her extended absence, and that she was advised to set up an appointment with Dr. Mason for a "disability determination" and that she was to contact the Social Security Administration regarding the possibility of permanent disability. The damage was extensive and there was too much damage at too many levels of the lumbar spine and she was classified as inoperable.

The Petitioner Tidwell was not on any type of "surplus" "downsizing" or "lay off" list as of Friday, April 19th, 1996. On April 19th, the same day that the supervisor was notified, the Respondent BellSouth removed Tidwell from their "self funded" "self administrated" and "self policed" worker's comp program and switched her to this Respondent's "self funded" "self administrated" and "self policed" medical insurance. Then on the next Monday, April 22, 1996, the Petitioner was called and advised that she would be laid off at the end of June 1996. Then on April 26, 1996 she was informed that she would not be laid off on June 30, 1996 that she had been "retroactively terminated" to March 31st, 1996 (26 days after March 31, 1996 had already passed but she was told that she could keep the money that she had already earned in April). Tidwell protested and fought the "retroactive termination". While waiting on the outcome of the grievance, no one knew if Tidwell was on the "payroll" or not. A retroactive termination had never been attempted and it was going to take some time to sort out, but in the meantime, Tidwell was not allowed to even apply for her Benefits because this Respondent had conveniently "retroactively terminated" her employment to March 31st – 3 days before the first x-ray was performed. Here was another deceitful tactic used in an attempt to prevent Tidwell from

even being able to apply for her STD/LTD benefits. Although the Petitioner Tidwell was properly excused by the physician, Tidwell was sent letters from this Respondent that she should be at work in a "light or modified duty position" which was offered and available. However, the letters sent to Tidwell were just another deceitful tactic used to fool the "reviewing committee" and the Courts and is one example of how this Respondent misrepresents events and reports which has resulted in a fraudulent and fabricated administrative record. The Petitioner was sent letters offering her a light or modified duty job which was available, however, they called her and informed her that she had been retroactively terminated and that she would be escorted off of the company's property if she did attempt to show up to perform the "light or modified duty job" mentioned in their letters. The CWA grievance was finally decided and Tidwell "won" the termination date of May 10 instead of the "retroactive" March 31st as this Respondent wanted. The Union and Ombudsmen advised Tidwell that due to possible "illegal activity" that she needed to hire an attorney and take her grievances to the Courts. She did but so far the Courts have ignored the actual events and the unethical, deceitful tactics used by this corporate giant. Their success at deceiving the Court's to improperly achieve judgments in their favor (such as the way their misrepresentations and "bad faith" tactics worked in their favor to improperly achieve Summary Judgment in their favor in this case) will only encourage them to continue these "bad faith" acts and their disgusting conduct in the future, hurting their present and future sick or injured employees. This Respondent acts and operates as if they are above the Law and the Courts must not let this continue. This Petitioner feels that her rights to equality under the Law as she was suppose to be protected under the *14th Amendment* has been violated. She is an average citizen and this multibillion dollar company is manipulating the Courts to escape the responsibility that the Law should be requiring them to honor. After the termination date was changed

from March 31st (because this Respondent could not "retroactively terminate" an employee per the outcome of the grievance), and moved to May 10th, this Respondent had no other choice but to allow the Petitioner Tidwell to apply for her STD/LTD Benefits. In another cruel and unethical move, the Respondent denied Tidwell her STD/LTD benefits. The reason they gave for not paying her her entitled benefits was that she should have been at work in the available and offered "light or modified" job however they just failed to inform the "reviewing committee" that during that period of time, she was threatened that if she did show up and attempted to perform the light or modified duty job that she would be escorted off of the property because she had been terminated. This Respondent made it impossible for this Petitioner to comply. This Respondent has built a fabricated administrative record that did not reflect this Petitioner's true medical condition, nor did it reflect actual dates and events that did occur. They used many other "Bad Faith" and deceitful tactics and they do not even deny this! They ignore published reprimands from the Courts and act as if they are above the Law, and so far, they have been. The Respondent knows that this is confusing and this is an unethical but clever tactic used by this Respondent to deceive the "reviewing committee" and the Courts. The Courts should take this as an insult and surely this Petition will be granted so the Legislative Intent of the ERISA Law will be justly fulfilled. If the Petition is not granted, it will appear that the Courts support this multibillion dollar company's unethical and unlawful tactics. The Petitioner prays that this Court is most concerned about justice being served and the 14th Amendment and not turning their heads to a company that has again and again attempted maneuvers to deny their injured and sick employees their Rightfully Entitled Benefits.

In October of 2000, Tidwell requested a status conference in front of The Honorable Judge Clemons and informed him that she desired to be represented by counsel and that she had been abandoned by her attorney. She explained to the

Judge that she was an Involuntary Pro'se litigant and asked for leniency if counsel could not be secured. The Judge agreed (Docket # 14 & 15). The above and below brief summary of facts and issues were brought before the District Court see Docket #'s 20, 23, #'s 25, 31, 32, 33, 34, 35, 36, 37, 38, 41, 43, 44, 45, and 47) and the Eleventh Circuit Court of Appeals (See Brief of the Appellant & Application of Rehearing). In addition, other reversible errors are listed:

Brief of the Appellant, page 19-21, The District Court erred when it used the dates fabricated by this Respondent and not the dates that actual events were occurring. The District Court also did not take into consideration that this Plan's administrators used deceptive tactics in an attempt to prevent her from even filing for her STD/LTD Benefits and she was impeded from having all of her submitted evidence and documents reviewed by the "reviewing committee".

The Petitioner shows that she submitted evidence to show that her disability began on the last day that she physically worked at BellSouth (as it has been shown was April 4, 1996) according to the Social Security Administration's investigation. Tidwell's disability benefits were retroactive back to April 4, 1996, several weeks before the administrators had been successful in getting her off the payroll. At the time of her termination, the administrators did not know that Tidwell was permanently and totally disabled but they did know that she was excused from work (even though they did not present all of the evidence to their "reviewing committee") and she had serious injuries that could possibly be permanently and totally disabling. The purpose for the attempted retroactive termination of Tidwell before the April 4, 1996 date is where the record would not show that they could possibly be responsible for a disabled employee, especially one that had been injured at work. (There was a retroactive termination followed by a grievance and during this period of time, no one knew if Tidwell was still an employee because the company wanted to retroactively terminate her employment to 3 days before the date that Dr. Faulkner discovered the extensive damage to

her spine, although 26 days had already passed, they made this retroactive termination decision in late April. Here is another confusing factor. This deliberate fraudulent scheme by the Respondent is extremely difficult to explain in a brief and is certainly not an issue to be decided by Summary Judgment. Tidwell fought a grievance and "won" the termination date of May 10, 1996 instead of March 31, 1996 as the plan's administrators were hoping for). This information is important in this case because there was an attempt to retroactively fire Tidwell prior to the date that they would have to allow her to even file for the STD benefits. The purpose of this attempted scheme was to get Tidwell retroactively off the payroll where she would be prevented from even having the opportunity to file for her STD/LTD benefits at all. This termination was mainly due to a worker's compensation conflict (which she never received benefits for* See Appendix _____), however, the Plan Administrators wanted the extra bonus of denying any and all benefits and they will do anything to achieve this. This is what prompted the attempted retroactive termination. Tidwell did "win" the termination date of May 10, 1996 in a grievance instead of March 31, 1996 as the administrators wanted and since they had to show her on the payroll, they had no other choice but to allow her to apply for her STD/LTD benefits. Because she did finally "win" the right to apply for STD/LTD as well as her other denied benefits, the company now claims that she should only receive benefits from April 25, 1996 (a date that they fabricated because the Petitioner had been off work since April 4, 1996) to May 10, 1996 (the other date selected to get Tidwell off of the payroll where they could then claimed that they were not responsible for any benefits after the May 10 date - the other date that these administrators "creatively selected". Tidwell's disability still continues and her STD/LTD benefits which would have included medical care from this Respondent's "self funded" medical insurance should still be continuing even today. That was one of the incentives in attempting to "retroactively terminate" her

employment but since that failed, they just pull another date "out of thin air" and claimed that they would not be responsible for her disability after the second date that they fabricated. Since Tidwell could prove that she was excused from work at the time of their denials, evidence that Tidwell submitted showing that she was excused from work, mysteriously disappeared and was never considered by the EBCRC or the "reviewing committee". The reason that this evidence was submitted was an attempt to show the Court the deceptive tactics used to deny her benefits. As explained in previous briefs, these tactics are extremely hard to convey to the Court without a personal presentation and this Petitioner is entitled to her day in Court, which she never did receive. The deceptive tactics used here misleads the Courts and the above was only stated as "On April 18, 1996, Petitioner reported that she would be absent from work due to illness" which has clearly been shown is a date that was fabricated by the Plan's Administrators and there was no "illness", they closed her worker's comp case that day and then stated that she had an "illness". April 18th was also the date that Tidwell's worker's compensation case was closed and the Plan's Administrators "switched" her from the "self funded" worker's comp to the "self funded" medical benefit plan and all benefits were denied. This is undisputed.

In addition to medical reports from the company physician that has now admitted that he did not even examine Tidwell's spine, other "bad faith" tactics were used. This Respondent "hand picked" and withheld evidence from the reviewing committee to review. Medical documents and opinions that strongly supported Tidwell's position were not presented for the "reviewing committee" to consider although Tidwell had submitted the documents to the plan's administrator on numerous occasions. The Petitioner Tidwell knew that the medical evidence that strongly supported that she be granted her STD/LTD benefits was not being revealed to the "reviewing committee". The plan's administrators had been caught withholding evidence before in this case and even though Tidwell submitted the

information to the Plan's Administrators, it mysteriously disappeared and was not considered by the "reviewing committee". Since Tidwell knew that this Respondent was withholding the evidence that strongly supported her position, she requested that she be able to attend the "reviewing committee's" meeting to ensure that all of the medical information was being presented to the "reviewing committee". Her requests were denied and all of the medical evidence that strongly supported her entitlement to her STD/LTD benefits that she submitted to the Plan's Administrators was withheld from the reviewing committee. This is one more way in which this Respondent deceived the "reviewing committee" and the Courts. The Petitioner Tidwell never received any compensation for her worker's compensation injuries. These injuries are confirmed by many physicians as "solely job related", totally disabling and she has been hospitalized 18 times for medical testing, numerous procedures, and numerous surgeries in an attempt to lessen her physician pain. One might think, how is this related to this Petition which deals with the denial of Tidwell's STD/LTD benefits? One way that the above situation has affected this appeal and Petition is that her legal issues are now left in such a mess that she can not get adequate counsel and she has been informed that it will be a monumental task to attempt to straighten out the issues left neglected or incomplete by her former attorney. The only way that an attorney is willing to represent her is to charge her a retainer and an hourly wage and she has been informed that it will take many hours to try to straighten the mess that her cases have been left in, something that she can not afford due to the past and present high out of pocket legal and medical expenses. This is relevant to this appeal and Petition because (1) it informs the Court the reason that the Petitioner Tidwell has been forced into this Involuntary Pro'se Litigant" Position, (2) it goes to the credibility of the Respondent - This Respondent knows that this employee was severely injured at their place of employment (something that they will now admit to since they have

escaped financial liability and the burden of paying for Tidwell's job related medical expenses.) It also shows the arbitrary and capricious decisions that this Respondent uses to deny any and all benefits. One of the most severe adverse effects that the Petitioner Tidwell must now face for the rest of her life is no "real" medical treatment for the severe on the job injuries. How does that relate to this appeal and Petition? This Respondent's self funded, self-administrated" and "self policed" worker's compensation program gloats with glory because they "got away with" not having to pay any worker's compensation benefits even though they knew that this employee was hurt at their place of employment. Another problem is their usual direct contradiction used to deny any and all benefits and their "self funded" "self-administrated" and "self policed" BC/BS Medical Plan rejects medical bills because they will not pay for treatment that is a result of "work related injuries" (hopefully this Petition will be granted and this Respondent will have to pay for her medical expenses which is a part of the STD/LTD Benefits that she is entitled to in this action, and (3) The Legislative Branch never intended for a loyal and good employee to be severely injured on the job (hospitalized over 18 times), lose most or all of her lifetime assets and serve a "life sentence" with no wages, entitled benefits, or medical care. These self funded plan Administrators have escaped financial liability to the Petitioner through fraud and deceit.

REASONS FOR GRANTING THE PETITION AND THE BODY OF THE PETITION

As allowed under United States Supreme Court Rule FRAP 10, the Involuntary Pro'se Petitioner, Caren Tidwell, respectfully request that the Honorable United States Supreme Court grant her petition of writ of certiorari. Extraordinary circumstances, our law, the rules of procedure, legal precedent established by the United States Supreme Court, and compelling reasons support her request for this petition to be granted.

Although a review on a writ of certiorari is not a matter of right, but of judicial discretion, it is important for the United

States Supreme Court to acknowledge in this case and to others around the nation that one individual can stand up to the corporate giant and say "These types of actions will not be tolerated by society or the Courts, and as wealthy and mighty as the Corporate Giant may be, they are not above the law." Our country was based on individual's rights and this Petitioner's rights have been violated. Recently, the President and the Legislators have urged the corporate giants to conduct themselves in a more ethical, honest, moral, and lawful manner, with their investors, with their employees, and with themselves. There are laws in place but the schemes and tactics deployed by some employers are becoming more callous as the corporate giant tries to find more loopholes and attempts more questionable maneuvers in order to try to escape the financial liability to their employees. And as in this case, why not just deny benefits automatically, punitive damages are not available and what does the employer have to lose after a long court battle-what it would have had to pay out in the beginning. In this particular case, the Respondent had total control of the decisions to grant or deny benefits because they were "self funded", "self administrated" and "self policed". In this case, they put their interest above that of the Petitioner's, which in ERISA is a breach of their fiduciary duty under ERISA. What incentive does an employer, such as this Respondent, have to pay the employee's deserved benefits when the employee applies for them—none and their being "self funded" is like putting a fox in charge of a henhouse. This Petitioner didn't just "fall through the cracks" this Respondent has a pattern of denying their employees their deserved benefits. As a matter of fact, there are two cases involving this same Respondent during the same time frame as the case at hand (and the same "self funded" decision makers were in control over all three cases - the two detailed below and the case at hand). *Godfrey v. BellSouth Telecommunications, Inc.*, 89 F.3d 755 (11th Cir. 1996). The *Marecek and Godfrey v. BellSouth* cases are relevant to this case because these were the exact same decision makers that were

making the decisions in the case at hand around the same time frame. Isn't it coincidental that the only employer that was ever reprimanded and did not survive any standard of review was the Respondent in this Petition and the same decision makers in the case at hand. Tidwell was under the same "self funded" plan administrators as Marecek and Godfrey in their appeals with BellSouth. For a more detailed look at how this Respondent handles their "self funded" Plans and ignores the Court's reprimands, please read Appendix G & H. This is the same decision makers and Plan administrators in all three cases, including the case at hand. In United States Court of Appeals, Eleventh Circuit. No. 93-6170. *Marecek v. BellSouth.*

> The U.S. Court of Appeals, Eleventh Circuit found that BellSouth "arbitrarily and capriciously denied Appellee's claim and reviewed the class member's claims." "The district court set out the facts that support Marecek's right to sickness, disability, benefits and found that that "plaintiff Marecek's" claim was arbitrary and capriciously denied by the Plan's fiduciaries, and the claims of the plaintiff...were not subjected to a full and fair review by the Plan's fiduciaries." "BST was wrong and the court did not have to give it credit for being wrong. If the benefits award was offset by her wages, then BST (and other companies that self- administer their plans) would have an incentive to do the same thing in the future: if the employer could threaten or cajole a disabled employee into returning to work, it could obtain the rewards of having an employee in that position without hiring a replacement and without paying anything in benefits." See Table of Authorities and Appendix G, *Godfrey v. BellSouth*, No. 95-6480. (11th Cir. 1996) for full opinion of this case.

BellSouth switched Tidwell from Worker's Comp Benefits to Sickness Benefits even though Tidwell protested and Dr. Faulkner advised BellSouth that the injury to her spine was from an on the job accident that occurred on October 30,

1995. Unbelievably, after the Switch from Comp to Sickness Benefits, BellSouth attempted to retroactively terminate Tidwell to 4 days before, Dr. Faulkner's or any other physician's, first medical testing and attempted to prevent her from even applying for benefits. This fact automatically calls this Appellee's credibility into question.

The 11th Circuit stated:

> "In only one case have we differentiated explicitly between an administrator's plan interpretation and fact-based findings; our resolution of that case, however, rendered a decision regarding the standard of review with respect to factual determinations to be unnecessary." See *Marecek v. BellSouth* "We decline to decide which standard of review should be applied for factual findings by a plan administrator as BellSouth's decision does not survive the most deferential standard of review." See Appendix H, *Marecek v. BellSouth*, No. 93-6170. 11th Cir. 1996)

Tidwell has already raised the issue of this Defendant's unreliable credibility and the Courts so far have played right into their hands. The deceit and bad faith works and the lower courts decisions that this Respondent acted in "good faith" is clearly erroneous. Also, Tidwell was the non-movant and all doubts were to be resolved in her favor. They clearly were not. The Law states: "In reviewing the district court's grant of summary judgment we must review the evidence and all reasonable factual inferences in the light most favorable to the party opposing the motion." See *Welch v. Celotex Corp.*, 951 F.2d 1235, 1237 (11th Cir.1992). In addition to the Law dictating that summary judgment is not appropriate when the credibility of one of the parties has been questioned, "When a party's credibility has been called into question "which at the "summary judgment" is inappropriate, because it is for the trier of fact to decide which story is to be believed." *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C.1995).

This Respondent has been forced into a Pro'se position and because of this the Law clearly states: "Because Plaintiff is

pro'se, the Court will consider factual averments (declarations or assertions) in his responses as evidence to the extent that they are not contradicted by other sworn testimony of Plaintiff." See *Simpson v. Horn*, No. Civ. A. 95-8028, 1998 WL 559802 at *2 (E.D.Pa. Aug. 31, 1998); *Hackman v. Valley Fair*, 932 F.2d 239, 241 (3d Cir. 1991) "allegations presented in a pro se complaint are held to less stringent standards than formal pleadings drafted by lawyers." (Memorandum Opinion at 2 n.2) (citing *Hayes v. Muller*, No. CIV. A. 96-3420, 1996 WL 583180, at *2 (E.D. Pa. Oct. 10, 1996), "Furthermore, "a court must assume a pro'se plaintiff's factual allegations are true and construe his claim liberally." The defendant can only contradict its own prior decisions. And the Court's have erred by not believing this Involuntary Pro'se Litigant. "In a *major ruling of August 27, 2002*, Judge Linwood Smith of the U.S. District Court for the Northern District of Alabama rejected the efforts of BellSouth to manipulate the selection of the judge and it would "impugn the public's perception of the impartial and efficient administration of justice". This is the same Judge and the same Respondent in this case that was mentioned by the Honorable Judge Linwood Smith.

Bruno v. BellSouth, 701 So.2d 1056 (La. App. 5 Cir. 1997) Is another case where this same Respondent, BellSouth forced another employee to use vacation days for doctor's appointments and physical therapy relating to her employment related injuries and that she was forced to "pay back" her worker's compensation benefits.

The lower court also erroneously determined that Tidwell has a "full and fair" review of her claims. This is clearly not the case. ERISA requires that there be "a full and fair review by the appropriate named fiduciary of the decision denying the claim." *29 USA Section 1133 (2)*. The administrative record in Tidwell's case is lacking due to the withholding of documents which they do not deny!

> "We have long held that in conducting review under an abuse of discretion standard, a district court should evaluate the administrator's fact findings

> regarding the eligibility of a claimant based on the evidence before the administrator, assuming that both parties were given an opportunity to present facts to the administrator." *Wildbur*, 974 F.2d at 639 (emphasis added); see also *Moore*, 993 F.2d at 102.

Tidwell did not have access to the meetings and BellSouth was withholding evidence from the reviewing committee. Besides the lack of access to the review meetings and the denial of a meaningful access to the claims process, BellSouth was also instructing Tidwell to come to work in "light or modified" duty on paper when denying her benefits, however, they instructed her that she had been retroactively terminated and that she would be escorted off of the property if she attempted to show up for work. The administrative review procedures, as well as the letters sent to Tidwell regarding her return to "light or modified duty" were deceptive, fraudulent, and unfair exceeding the arbitrary and capricious standards. Our Law states:

"The duties of plan fiduciaries extend to communications with participants and beneficiaries regarding plan benefits. Misrepresentation (at least intentional) of facts to participants making decisions about plan participation and options also can violate ERISA's fiduciary duties." E.g., *Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996). "It is important that reviews of denied claims not only be "full and fair," but that they appear "full and fair." *Id.* All of the above is in violation of *29 U.S.C. §1001-1461, 29 U.S.C. § 1132 (a)(1)(B); 29 U.S.C.§ 1132(a)(3); ERISA Sections 502(a)(1)(B), 29 U.S.C. § 1133. (2), Section 510 of ERISA, 29 U.S.C. § 1140, and 29 U.S.C. § 1141.* Also, since there is an obvious and established conflict of interest, this Court is allowed to go further and consider the self-interest of this defendant. The Defendant incorrectly interpreted the plan language as shown in Docket # 23, The Affidavit of Caren Tidwell.

The Published Cases and The Record will show that this Respondent ignores the orders and published reprimands of the Courts, acts in a fashion as if they are above the Law, uses deceit and a fabricated record that does not reflect the actual events that occurred, and withholds medical evidence

from the "reviewing committee" all in order to deny the employee's benefits. That is what has happened in this case and in other cases involving this Respondent. The case at hand also involves many "bad faith" tactics that even include one of this Respondent's attorneys e-mailing another one of their own attorneys that was to attend a hearing the next day before the Honorable Chief Justice Clemons in Birmingham. One of this Respondent's "in house" attorneys instructed the other attorney (contracted out to an independent Law Firm) to deny facts that they both knew to be true if the Judge ask them questions regarding that subject. That plan was foiled when the e-mail was accidentally sent to the Petitioner, Caren Tidwell instead of the other attorney. Although that "bad faith" tactic was stopped before it occurred, Judge Clemons never knew about the dishonest scheme because it was never reported. The Respondent's attorney informed Tidwell that she could not tell the Judge about this incident or it could get her case thrown out of court and certain things could not be discussed with the Judge. This Petitioner, being an Involuntary Pro'se litigant was afraid to report this attempted deceit. This dishonest tactic was raised post trial but that act just seems to be ignored by everyone and the Court of Appeals failed to review this Petitioner's Post Trial Motions (and they were in error when they did not review these Post Trial Motions).

This Respondent also does not dispute that another affiliate of BellSouth (one that the STD Plan refers to the coordination of benefits with other BellSouth related companies) denied Tidwell coverage on a BellSouth Credit Card because BellSouth had terminated her because she was disabled and not from lock-out, lay-off, or suspension. They wrote her and told her that they had terminated her because she was Disabled (Affidavit of Tidwell # 24, 34.2 Plaintiff's Exhibit # 29). This affiliate's decision was a violation in the interpretation of the Plan and The Court was allowed to go further. They were in error by not doing so.

Tidwell contends that if she had not been unlawfully terminated that she would still be receiving her STD/LTD benefits. Like in *Levinson*, *See Table of Authorities for lengthy citation, Tidwell has continued to provide information that she is still totally disabled (confirmed after termination but prior to the final review committee meeting) and her benefits should still be continuing and the issue of her continuing disability is uncontested.

Also, the 11th Circuit refused to consider the post trial motion requested to be reviewed by Tidwell. They incorrectly stated that these documents were not before the trial court so they would not review them. (Reversible due to clear error as shown in *Levinson "We review this factual finding for clear error." "with the definite and firm conviction that a mistake has been committed." Tidwell request that this Court reconsider or grant a hearing due to a clerical error by the District Court in Birmingham, Alabama. This error caused the 11th Circuit to fail to consider evidence that was properly submitted before the District Court made its ruling, the 11th Circuit stated that this evidence was not in the record prior to the Judge's ruling which is clearly in error on the Court's part *(*Levinson* "We review this factual finding for clear error."..."with the definite and firm conviction that a mistake has been committed." The Docket Record kept by the District Court failed to Note that Exhibits were attached to this appellant's motion opposing this Appellee's request for Summary Judgment (Docket # 20). The Exhibits submitted with that Motion (Docket # 20) were separate from the Volumes retained by the Court and the Exhibits in question were located with the Exhibits that the Court improperly indicated it would not review or consider *(*Levinson)* On August 9th, 2002, the Petitioner, Caren Tidwell, made arrangements for her daughter and niece to drive her to Atlanta where she could review the record in this case. This Court mentioned in its memorandum opinion that Tidwell discussed certain documents in her appeal that were not raised or considered by the District Court, therefore they were not considered in this appeal. The

Petitioner knew that she had submitted the documents in question with her Opposition to this Appellee's Motion of Summary Judgment (which was submitted before any Ruling or the Motion of Reconsideration - the Motion that the 11th Circuit incorrectly stated that it would not consider) (**Levinson)* At approximately 1:00 on Friday, August 9th, Tidwell went to the Clerk's Office at the 11th Circuit to review the Record. The Record for this case was pulled and the documents that the 11th Circuit stated was not included in the Record before the Plaintiff's post trial motions were located. Tidwell will admit that these documents were difficult to locate because of their placement in the file - Docket Reference #20 and the Exhibits to this Motion were separated and placed in with the evidence from the post trial Motion that this Court stated that it would not consider. It took some deciphering by Tidwell and the Court Clerk to figure out what was going on with this file. Tidwell knew that these documents were a part of the Record prior to any post trial motions. She did not understand how the Court (11th Circuit) based their decision, affirming this Appellee's Motion of Summary Judgment, without reviewing the evidence that was submitted with her Opposition to their Motion requesting Summary Judgment (Docket #20) (**Levinson)* or the evidence that was properly before the District Court in her Motion of Reconsideration that the 11th Circuit improperly failed to review. The Court affirmed "because Tidwell did not present any medical evidence to the review committee to show that she was disabled from "any type of work" during the period for which the review committee denied her benefits." Tidwell did submit medical evidence to the reviewing committee, the District Court, and the 11th Circuit, and this evidence is located in the Record (Exhibits to Docket Reference # 20 which is located with the exhibits that went to the post trial motions that this Court stated that it would not consider. After locating the evidence that was in the Record prior to any post trial motions, Tidwell and the Clerk discovered how these documents were overlooked. On the Docket Sheet retained

by the Court, the Clerk in Birmingham had failed to note that attachments were in the Record that went to Docket Reference #20 is this the Petitioner's Opposition to the Respondent's request for Summary Judgment. There are documents and critical evidence in the Record, that was properly submitted to the District Court prior to the Initial Ruling or any Post Trial Motions for Reconsideration that the 11th Circuit did not examine because the Docket Sheet did not indicate that there were attachments to Docket Reference #20 (which was a clerical oversight by the typist in Birmingham) and those Exhibits were located with the documents that this Court stated it would not consider (documents submitted with her opposition to this Respondent's Motion for Summary Judgment and her post trial motion for reconsideration) (**Levinson* "We review this factual finding for clear error."..."with the definite and firm conviction that a mistake has been committed."). After discovering how the evidence submitted pre-trial was overlooked by the Courts, Tidwell requested an Application of Re-hearing. Tidwell did properly set forth the request to have the 11th Circuit review her post trial motion of reconsideration (which they incorrectly refused to review but even if she had not been precisely correct, the 11th Circuit should have reviewed her claim anyway because

"The denial of a pro se litigant on technical ground is against the legal precedent from the United States Supreme Court applicable to the pro se. .....[d]ecisions of the United States Supreme Court rendered by written opinion are binding on all courts, state and federal. The court's holding is stare decisis and cannot be overruled except by the court itself. Even the court's dicta has persuasive precedential value." *Jordan v Gilligan*, 500 F2d 701 at 707 (6th Cir ND Ohio 1974).

The circumstances in this case are truly extraordinary and hopefully these extraordinary circumstances will compel this Court to remind the nation that one individual's rights do count and that the corporate giants of today are not above the Law. This Court should grant certiorari as set forth in *FRAP Rule 10 (a), Rule 10 (c)*, consider that this Respondent

improperly achieved Summary Judgment through lies, "bad faith" tactics, unethical conduct, and schemes and maneuvers designed to deceive their "reviewing committee" and the Courts. The questions of first impression also should be answered by this Court to show the employers, such as this Respondent, that there is a limit to the tactics that they can attempt in order to deny their sick, injured, or disabled employees their entitled benefits. Corporations must be informed by this Court that maneuvers such as "retroactively terminating" an employee to a date before the sickness or disability was discovered in an attempt to prevent the employee from applying for benefits will not be tolerated. Also shown in the Brief of the Appellant, Beginning at Page 21, "The District Court was misled by an administrative record that did not represent the actual facts and the administrative record did not reflect what was actually occurring." Since the Plan's Administrators failed to prevent Tidwell, now the Petitioner from filing a claim for her STD/LTD benefits with their scheme to retroactively terminate her employment to a date before her disability began, the Plan Administrators then denied her access to the company's property preventing her from performing the offered and available "light or modified duties" and then denied her claims because she was not at work to perform the offered and available modified duties because they denied her access to the company's property. This is confusing and this confusion is a clever but an unethical tactic to deceive the reviewing committee (they only were informed that Tidwell did not show up to perform the available and offered "light or modified" duties but they were never informed that Tidwell was denied access to the company property where the "light or modified duties" could be preformed. This is also a tactic to deceive the Courts and is further explained in the "Statement of the Case" included in this Petition. This Respondent made it impossible for the Petitioner Tidwell to comply. Research performed shows that there has not been a situation such as this and there is no state or federal opinion that answers this important question. This leads to the first Question of First Impression: *Question*

#1 "Can an employer deny STD/LTD benefits because they claim that the employee should be at work in a light or modified duty job, and then deny the employee access to the company's property in an attempt to prevent the employee from performing the offered light or modified duties in order to deny benefits? As shown in the Brief of the Appellant, page 22, another extremely important factor is that these Plan Administrators were creating an administrative record that did not represent the actual facts and the record did not reflect what was occurring. Tidwell has already shown the Court the fabricated dates, among other issues, and these tactics are further explained in the Statement of the Case included in this Petition, as well as in the Record on Appeal. However, one very important note is that during the denial benefit period of April 25, 1996 though the fabricated date of May 10, 1996, the Plan Administrators were sending Tidwell letters stating that her benefits were being denied because she should show up for work in light or modified duty. First, the benefits were denied because the Plan Administrator withheld evidence that supported her position. Secondly, due to the attempted retroactive termination (which is explained full below and in the Statement of the Case) no one knew if Tidwell was still on the payroll. The Plan Administrators wanted to prevent Tidwell from even filing for the STD/LTD Benefits (that is why they selected an attempted retroactive termination date to the date 4 days before Dr. Faulkner discovers the devastating damage to her spine - this becomes important because the attempted retroactive termination date selected by the Plan Administrators was 4 days prior to the Social Security Administration's awarding her total and permanent disability benefits.) This leads to the second question of first impression. Research performed shows that there has not been a situation such as this and there is no state or federal opinion that answers this important question. *Question* #2: "Can an employer attempt to retroactively terminate an employee's employment to a date prior to the date that the employee became ill or injured, in an attempt to prevent the employee from applying for benefits?" As we were discussing, the Plan

Administrators were writing her denying benefits because she should be at work in light or modified duty job but she had been informed that she had been retroactively terminated and that she was not to come on the company property and she could not show up for work under any capacity. Now how can Tidwell be at work in a light or modified duty job when she had been fired and advised that she was not to step on the company's property? This denied Tidwell access to her job.

Because it was a new development, the fact that this Respondent went to state court and argued that Tidwell was disabled at the time of her termination, 3 weeks after they had taken a totally opposite position before the District Court was not raised before the District Court because it had not happened at that time, however, this newly discovered position was asserted by this Respondent after the District Court made its ruling. This was brought before the Court of Appeals and is discussed in the Brief of the Appellant, page 21 and is basically self explanatory. Also, here is another issue that the 11th Circuit incorrectly refused to consider because they improperly denied reviewing this Petitioner's Motion of Reconsideration, which was an error on their part.

The third question of first impression is *Question #3*: "Can an employer maintain in one action (this Federal Court case) that the employee is not disabled in order to deny disability benefits and then at the same time take the position that she is disabled in another Civil Action (Alabama State Court) to minimize their damages, claiming that the employee was disabled and not entitled to lost wages due to her disability?

Now why are the above three questions important for this Court to answer? The situation below will help explain the adverse effects of this type of conduct being continued and allowed by the Courts. If the Courts allow this defendant to prevail if this case, it would set up a situation similar to the one described on page vi of this brief titled ADVERSE EXAMPLES IN AFFIRMING THIS RULING. (This example was brought before the trial court in the Plaintiff's Opposition to the Defendant's Motion of Summary Judgment and it was also presented to the 11th Circuit Court of Appeals. These

questions were left unresolved and unanswered. The hard working citizens of our Country deserve to have these questions answered. After the Court reviews the adverse consequences of affirming this judgment, there is no way that the above can be construed as reasonable, rational, and/or justified. This is cruel and their actions and lack of actions are inexcusable. All of the facts above were known to the administrators at the time of their decisions; they just failed to inform the reviewing committee of the "whole truth". There is no way that any Court would believe that this would be rational, reasonable, or correct; it is obvious that there was improper motive and "Bad Faith".

The Petitioner will now show how the decisions of the lower court was erroneous and how the decision of the court that decided this case is in conflict with the decisions of another appellate court *(*Levinson)*

The District Court erred by using August 6, 1996 as the final date for review when the final meeting to exhaust the administrative process was on November 19, 1996. There was also another review meeting on September 5, 1996. The District Court did not base its decision on the correct final date of review and this error caused the Court to exclude evidence that it should have considered on the Petitioner's behalf. The Court even excluded considering a letter to this Petitioner from this Respondent acknowledging that they had terminated her employment because she was disabled! Brief of the Appellant, pages 2-8, 17-19). Also, on both dates the Petitioner can show that the Plan's Administrators withheld evidence that supported her position and on both dates she was denied a full and fair review as called for by the Plan). The Court's confusion of this case is easily understood and this is a tactic that this Respondent relies heavily upon. Due to this Respondent's intentional attempts at deceit, it is obvious that the fact finder (which is the Court on a Motion of Summary Judgment) has misinterpreted the facts in the case, which is understandable because the deceptive tactics used by the Respondent were designed to do just that, deceive the "reviewing committee" and the Courts, and achieve an

improper fraudulent ruling in their favor. The District Court erred when it was mislead by a fabricated administrative record. The Respondent intentionally misrepresented facts to the reviewing committee which is in violation of ERISA's fiduciary duties. In addition, by "handpicking" evidence for the reviewing committee to review, this denied this Petitioner an opportunity to present all facts to the administrator, which is in violation of ERISA; Brief of the Appellant, pages 8-16)

Also, company physician reports were the only reports available for the "reviewing committee" to consider regarding the Petitioner's medical condition in the months preceding her applying for STD/LTD benefits. This Respondent had total control over this Petitioner's medical care for months prior to her applying for Benefits. And as explained in the above Statement of the Case, the medical evaluations created by the Respondent's physician were not an accurate account of the Petitioner's true medical condition. The Petitioner was injured at work and this Petitioner was required to see the Respondent's physician only and she was not allowed to go to an "independent" doctor. The Petitioner repeatedly requested a simple lumbar x-ray because she knew that she had been injured. This request was denied for over 5 months. Although these company physician reports were sent to the "reviewing committee" to review, the "reviewing committee" was never informed that this company physician render these reports and opinions and he has now admitted in a deposition that he did not even examine the Petitioner's spine after she was severely injured. Intentional fraud has been committed by this Respondent against the Petitioner, the Reviewing Committee, and the Courts. The District Court erred by relying on a medical opinion that had no legal foundation, Brief of the Appellant, pages 16-17). Quoted in *Levinson v. Reliance* (U.S. 11th Circuit) No. 00-11187, "The district court also gave less weight to Myerburg's testimony, as he was a reviewing physician, and not a treating physician or examining physician." The court cited *Donaho v. FMC Corp.*, 74 F.3d 894, 901 (8th Cir. 1996), to support this conclusion." In *Chapman* (*as quoted in Chapman v. AI Transport*, Nos. 97-8838,

97-9086 and 97-9269, U.S. Court of Appeals, 11th Circuit, July 13, 1999. See Table of Authorities and Appendix ___ for lengthy citation) there was doubt on the credibility of subjective explanations that were not susceptible to evidentiary support. This Petitioner's case is stronger because she does have actual evidentiary support that proves that this Respondent is not credible and the deceptive tactics used in Tidwell's denials denied her her rights to a "full and fair" review as called for by the Plan. As shown in Appendix ____ in cases such as this one, our Law states that "Summary Judgment is not appropriate".

> "The duties of plan fiduciaries extend to communications with participants and beneficiaries regarding plan benefits. Misrepresentation (at least intentional) of facts to participants making decisions about plan participation and options also can violate ERISA's fiduciary duties. E.g., *Varity Corp. v. Howe*, 116 S.Ct. 1065 (1996). "It is important that reviews of denied claims not only be "full and fair," but that they appear "full and fair." "We have long held that in conducting review under an abuse of discretion standard, a district court should evaluate the administrator's fact findings regarding the eligibility of a claimant based on the evidence before the administrator, assuming that both parties were given an opportunity to present facts to the administrator." *Wildbur*, 974 F.2d at 639 (emphasis added); see also Moore, 993 F.2d at 102.

By withholding documents which supported the Petitioners position, this Respondent intentionally misrepresented or omitted facts to the "reviewing committee" which is in violation of ERISA's fiduciary duties. When this "self funded" "self administrated" and "self policed" fiduciary "hand picked", fabricated, and omitted evidence to the reviewing Committee, this denied the Petitioner Tidwell's rights to a full and fair review which is required under the Law. The Petitioner can and has proved that the reviews of her claims

were not "full and fair", nor did they appear to be full and fair due to the deceptive tactics that have been exposed.

ERISA cases are to be decided by the facts known to the administrator at the time of their decision. The Petitioner can prove that she submitted evidence that was withheld and never reviewed by the committee. (Brief of Appellant, pages 8-16). Specific evidence is then detailed that was excluded from the District Court's consideration. First, please be advised that August 6, 1996 was not the last administrative review meeting. The last administrative meeting was on November 19, 1996 and the meeting held before that meeting was on September 5, 1996. This case is so confusing, that it is obvious that the fact finder did not base his or her decision on the correct EBCRC's (the "reviewing committee") review of her claim. The Petitioner shows that in addition to the evidence that was submitted before the September 5, 1996 meeting, there is additional evidence showing that even more documents were submitted before the November 19, 1996 meeting.

The District Court erred in granting the Respondent's Motion for Summary Judgment because this is a complex case that can not adequately be presented by submitting briefs or in a brief Oral Argument. Many material facts still remain to be decided by a finder of fact. The deceptive tactics used by the Respondent makes it impossible for the Petitioner to present her evidence without personally being present to answer the fact finder's questions. The District Court was misled by the administrative record that was lacking, also, the Opinion incorrectly states that "On May 1, 1996, Plaintiff wrote to BellSouth concerning her physical condition but she did not include any medical records or other evidence in the letter." A closer review of the evidence shows that numerous pieces of evidence were attached to that letter. This misunderstanding again caused the District Court to unintentionally exclude evidence that supported the Petitioner's position.

In addition to the above and as shown on beginning at page 24 of the Brief of the Appellant and another example on page 26 of this Petition, the District Court failed to consider

Fiduciary adopted a different interpretation of the "Plan" which is a violation of ERISA.

CONCLUSION: For the above reasons, the Petitioner prays that this Honorable Court will grant her Petition where a brief on the merits can be submitted which will give this Court a more informed look at how this Respondent deceives the Courts and their own "Reviewing Committee". This Petitioner is entitled to her day in Court and our Law states that a case with credibility issues should not be determined on a Motion of Summary Judgment. Many material facts still remain to be decided by a finder of fact. All doubts were not resolved in this Petitioner's favor as required by Law. This Respondent improperly achieved their Motion of Summary Judgment for the above stated reasons and this Petitioner request that their Motion of Summary Judgment be reversed and this case be remanded for a trial, so the true facts-not a fraudulent, fabricated administrative Record determines this case and not allow erroneous findings of fact and conclusions of Law to interfere in the administration of justice. Reversal is warranted where the Correct Law can be applied, proper Procedures be conducted, and errors committed by the Court system which caused critical evidence on this Petitioner's behalf to be improperly excluded be considered as she is entitled to.. Justice demands that this Petitioner receive her day in Court, where all of the Respondent's deceitful tactics can be personally presented, the finder of fact be able to ask both parties questions regarding the fraud and deceit, and where the evidence excluded by the District Court's clerical error which caused the Courts to exclude critical evidence on the Petitioner's behalf, thereby causing the Courts to exclude from review critical evidence that was properly in the Record on the Petitioner's behalf (Court improperly excluded evidence on three separate Motions). The finder of fact in this case did not even use the correct date for the last reviewing committee meeting, again excluding evidence that should have been considered on the Petitioner's behalf. The Law, the administration of justice, and the Constitution dictate reversal in this case so this Petitioner rightfully receives her day in Court (without her evidence being excluded by errors of the Court).

INDEX TO APPENDICES

APPENDIX A
Application of Rehearing Denied
The United States Court of Appeals, Eleventh Circuit
App. 3

APPENDIX B
Appellate Memorandum Opinion
The United States Court of Appeals
Eleventh Circuit
App. 4 – 8

APPENDIX C
Plaintiff timely filed Post Trial Motions
With Attachments
Post Trial Motions Denied
App. 9

APPENDIX D
Motion of Summary Judgment
Granted to Defendant/Respondent
Memorandum Opinion
United States District Court
Northern District of Alabama
App. 10 - 14

APPENDIX E
Motion of Summary Judgment
Granted to Defendant/Respondent
Summary and Final Judgment

United States District Court
Northern District of Alabama
App. 15

APPENDIX F

Constitutional and Statutory Provisions
App. 16 - 17

APPENDIX G

Godfrey v. BellSouth
No. 95-6480. (11th Cir. 1996)
App. 18 - 28
*(vi) any other material the petitioner believes essential to understand the petition. If the material required by this subparagraph is voluminous, it may be presented in a separate volume or volumes with appropriate covers.

APPENDIX H

Marecek v. BellSouth
No. 93-6170. (11th Cir. 1996)
Appendix 29 – 39
*(vi) any other material the petitioner believes essential to understand the petition. If the material required by this subparagraph is voluminous, it may be presented in a separate volume or volumes with appropriate covers.

APPENDIX A

Application of Rehearing Denied

The United States Court of Appeals, Eleventh Circuit Filed in the United States Court of Appeals, Eleventh Circuit on October 08, 2002, by Thomas K. Kahn, Clerk. No. 01-14239-AA - On Appeal from the United States District Court for the Northern District of Alabama - District Court Docket Number 00-01197-CV-C-S, Chief Justice Clemons, presided over the Motion of Summary Judgment. Before the Honorable Judge Black, Carnes, and Marcus, Circuit Judges. Per Curiam: The petition for rehearing filed by Appellant Caren Tidwell is Denied. Entered for the by Court by United States Circuit Judge Carnes.

APPENDIX B
Appellate Memorandum Opinion

Appellate Memorandum Opinion issued by the United States Court of Appeals, Eleventh Circuit, on July 24, 2002 – NOT PUBLISHED

No. 01-14239-AA – On Appeal from the United States District Court for the Northern District of Alabama – District Court Docket Number 00-01197-CV-C-S, Chief Justice Clemons, presided over the Motion of Summary Judgment. Before the Honorable Judge Black, Carnes, and Marcus, Circuit Judges.

Per Curiam:
Memorandum Opinion issued by the United States Court of Appeals, Eleventh Circuit

Caren Tidwell appeals pro se the district court's grant of summary judgment to defendant BellSouth Telecommunications, Inc. in her Employment Retirement Income Security Act ("ERISA") action, brought under 29 U.S.C. § 1132(a)(1)(B).

BellSouth's Employees' Benefit Claim Review Committee ("review committee") denied Tidwell's request for short term disability benefits under BellSouth's disability plan for the period from April 25, 1996 to May 10, 1996. She sued BellSouth claiming that the denial of benefits was erroneous, arbitrary and capricious and in bad faith, and further that BellSouth had "manufactured" the evidence that was put before its review committee. The district court granted BellSouth's motion for summary Judgment.

On appeal, Tidwell repeats her arguments that BellSouth acted arbitrarily and capriciously as well as in bad faith by denying her benefits, and that by "hand picking" medical documents for the review committee to review it "manufactured" evidence that did not reflect
the true facts.

Before reaching those arguments, however, there are three collateral issues that merit brief discussion. First,

Tidwell raises issues her that she did not raise before the lower court. She newly alleges, inter alia, that BellSouth is prohibited from claiming she was not disabled because in a separate state action it argued that she was disabled and so it did not have to pay her lost wages. Generally, we will not consider issues that the appellant failed to raise before the district court. See Narey v. Dean, 32 f.3d 1521, 1526-27 (11th Cir, 1994). Although there are five exceptions to this rule, none of them applies to this case. Id. Therefore, we will not consider Tidwell's newly raised Issues.

Second, along with her appeal, Tidwell submitted many documents that were never presented to the district court. Because these documents were not filed with the district court, they do no constitute part of the record on appeal and we will not consider them. See Fed. R. App. P. 10(a)(3).

Finally, Tidwell argues in her initial appellate brief that the district court's erroneously denied her motion to alter, amend, reconsider or set aside it judgment. However, she did not file a timely notice of appeal regarding this order. As the record indicates, Tidwell motion to alter, amend, reconsider, or set aside judgment was entered on the docket on August 29, 2001 while her notice of appeal was filed before then, on July 23, 2001. She did not file another notice of appeal nor can any of her other pleadings be construed as a notice of appeal. As we have previously held, the timely filing of a notice of appeal is a mandatory prerequisite to the exercise of appellate jurisdiction. Haney v. Mizell Memorial Hosp., 744 F.2s 1467, 1472 (11th Cir. 1984). A notice of appeal in a civil case must be filed within 30 days after the judgment or order appealed from is entered. Fed. R. App. P. 4(a)(1)(A). Accordingly, the scope of our appellate review does not include the denial of the motion to alter, amend, reconsider, or set aside judgment and so we will not review it.

Having dealt with those three collateral matters, we now turn to the heart of Tidwell's appeal. She contends that the district court erred in granting summary judgment against her on her claim that BellSouth arbitrarily and capriciously

denied her benefits. This Court reviews the district court' grant of summary judgment de novo, viewing the evidence in the light most favorable to the party opposing the motion. See Perrino v. Southern Bell Tel. & Tel. Co., 209 F.3d 1309, 1314-15 (11th Cir. 2000). Summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c).

In reviewing benefits determinations made under an ERISA plan, we apply the following legal analysis:

The Supreme Court (has) stated that, general, courts should review claims challenging an ERISA claim administrator's denial of benefits under a de novo standard.....The Court explained that the arbitrary and capricious standard of review is appropriate, however, when the plan documents at issue explicitly grant the claims administrator discretion to determine eligibility or construe terms of the plan. The arbitrary and capricious deference is diminished, though, if the claims administrator was acting under a conflict of interest. If the claims administrator was acting under a conflict of interest, the burden shifts to the administrator to prove that its interpretation of the plan provisions committed to its discretion was not tainted by self interest. Accordingly, this court has adopted the following standards for reviewing administrators' plan interpretations: (1) de novo where the plan does not grant the administrator discretion; (2) arbitrary and capricious where the plan grants the administrator discretion; and (3) heightened arbitrary and capricious where there is a conflict of interest.....

In reviewing a claim administrator's benefits determination, the court follows a series of steps.....At each step, the court makes a determination that results in either the progression to the next step or the end of the inquiry.....

First, a court looks to the plan documents to determine whether the plan documents grant the claims administrator discretion to interpret disputed terms. (Footnote # 1 - The

BellSouth plan documents unambiguously and undisputedly grant EBCRC discretion to interpret the terms of the plan.) If the court finds that the documents grant the claims administrator discretion, then at a minimum, the court applies arbitrary and capricious review and possibly heightened arbitrary and capricious review. Regardless of whether arbitrary and capricious or heightened arbitrary and capricious review applies, the court evaluates that claims administrator's interpretation of the plan to determine whether it is "wrong." Only when the court disagrees with the decision does it look for a conflict and, when it finds such a conflict, it reconsiders the decision in light of this conflict. HCA Health Services of Georgia, Inc. v. Employers Health Insurance Co., 240 F.3d 982, 992-93 (11th Cir. 2001). "Wrong" is the label used by our precedent to describe the conclusion a court reaches when, after reviewing the plan documents and disputed terms *de novo*, the court disagrees with the claims administrator's plan interpretation." Id. At 993 n. 23 (citations omitted).

We conclude, on the basis of the record, that the administrator's benefits determination was right. BellSouth properly interpreted the language of the plan in reviewing Tidwell's entitlement to benefits. The BellSouth plan defined "disabled" as "unable to perform any type of work.....with or without accommodations." The review committee correctly denied Tidwell benefits that she had requested, because Tidwell did not present any medical evidence to the review committee to show that she was disabled from "any type of work" during the period for which the review committee denied her benefits. Nor was the review committee's decision in any way arbitrary and capricious or in bad faith. The district court therefore was correct to uphold the review committee's denial of Tidwell's benefits. AFFIRMED.

APPENDIX C

Post Trial Motions Denied

Plaintiff timely filed Post Trial Motions
With Attachments
Docket Item #'s 31, 32, 33, and 37

Post Trial Motions Denied
Date of Post Trial Motion Denials 08/28/01 & 08/29/01

District Court Case Number 00-C-1197-S
United States District Court
The Northern District of Alabama
Justice U.W. Clemons
Denial Docket Item #'s 43, 44, 45, 47

APPENDIX D

Motion of Summary Judgment/Granted to Respondent

Memorandum Opinion Entered on July 2, 2001
District Court Case Number 00-C-1197-S
United States District Court
The Northern District of Alabama
Justice U.W. Clemons
Docket Item # 29

District Court's Memorandum Opinion

Both parties have moved for summary judgment in this case arising under the Employee Retirement Income Security Act, 29 U.S.C. § 1101 *et seq.* ("ERISA").

Plaintiff Caren J. Tidwell alleges that, in violation of ERISA, she was denied coverage under Defendant BellSouth Telecommunications, Inc. ("BellSouth")'s Short Term Disability Plan ("STD Plan") for the periods of July 13, 1995 through July 23, 1995; and April 25, 1996, through May 10, 1996. The dispositive legal issue is whether BellSouth's decision denying such benefits to Plaintiff is arbitrary and capricious.

Based on the undisputed facts, BellSouth is entitled to judgment as a matter of law.

I.

Plaintiff worked for BellSouth as an Administrative Resorts Clerk. Because of various injuries, she applied for benefits under BellSouth's STD Plan (1) at different times. It is undisputed that the STD Plan is an ERISA plan.

On January 30, 1995, Plaintiff did not report for work because of a back condition. STD benefits were approved for the period of January 30, 1995 through March 8, 1995. (Def. Exh. 5 a 521-22).

On May 11, 1995, Plaintiff was absent from work because of back surgery. STD benefits were approved from May 11, 1995 through June 22, 1995. (Id. At 525.)

On July 12, 1995, Dr. Savage indicated that Plaintiff could return to work. (Id. At 633) She returned to work on July 24, 1995 (Id. At 526). BellSouth denied her application for benefits for the period of July 23, 1995 through July 23, 1995. (Id. At 526). Plaintiff appealed to the Employees' Benefit Claim Review Committee ("EBCRC" or the "reviewing committee"), a committee composed of BellSouth employees.

Upon review of her claim, the EBCRC found that Plaintiff was entitled to benefits from July 23, 1995 through July 12, 1996. (Id. At 529) 2 However, the EBCRC affirmed BellSouth's denial of benefits to Plaintiff for the period of July 13, 1995, through July 23, 1995. However, the EBCRC affirmed BellSouth's denial of benefits to Plaintiff for the period of July 3, 1995, through July 23, 1995.

On October 30, 1995, Plaintiff suffered a fall while at work and further injured her back. On April 18, 1996, Plaintiff reported that she would be absent from work due to illness. (Id. At 527.) On April 22, 1996, Marsha Wooding, Manager of Disability Benefits, wrote to Plaintiff reminding her that to be qualified for STD Plan benefits, she must demonstrate that she is disabled from all work. (Id. At 436.)

On May 1, 1996, Plaintiff wrote to BellSouth concerning her physical condition, but she did not include any medical records or other evidence in the letter. (Id. At 538-42.)

BellSouth denied Plaintiff's requested benefits for the period of April 24, 1996 through May 10, 1996. This denial was affirmed by the EBCRC on August 6, 1996.

Plaintiff's STD Plan Benefits file, (Id. At 520-529), reflects that on March 18, 1996, Dr. Bramlett examined her and found that "her job restrictions allows her to work on a day to day basis" (Id. At 527.)

On April 4, 1996, Plaintiff underwent a cervical spine MRI and a lumbar spine MRI. (Plaintiff's Exhibit 14). On April 13, 1996, a note from Dr. Faulkner stated that Plaintiff "was under our care and off work." (Plaintiff Exhibit 17.) On April 26, 1996, Leesa Miles physical therapist reported that Plaintiff was being treated four times a week for

deceased strength, sensation deficits, and low back pain/neck pain. (Defendant Exhibit 5 at 529).

All of this medical evidence was included in Plaintiff's file at the time of the EBCRC's review of her claim on August 6, 1996.

On May 10, 1996, Plaintiff was terminated by BellSouth. (Id.)

Plaintiff has submitted to the Court a report from Dr. Anne Mason dated November 18, 1996, which states in part, "Caren Tidwell is my patient. She has multiple injuries that are solely job related. A slight Narrowing of the C 4-5 and Bulging Disk at the C 5-6 and C 6—7 levels of the Cervical Spine.....Repetitive Trauma to the right carpal tunnel.....Repetitive Trauma to the right scalene muscles.....Chronic pain and stress has caused Alopecia Areata which she receives medical treatment from a dermatologist.....A sacroiliac joint injury caused by repetitive lifting bending, and twisting. This injury has caused leg length disparity. This injury has also caused multiple musculoskeletal problems. Because of this injury, the hips knees, ankles, and plantar fascitis are effected and will produce a deteriorating condition over the long term.....This patient has chronic lumbar and coccyx pain.....The most severe injuries are moderate to severe mechanical arthritis at the L 3-4, L 4-5, and extremely severe mechanical arthritis at the L5-S1. The was solely job related (a repetitive lifting, bending, twisting injury) and can be verify by more than one of her attending physicians. This condition has caused severe lordosis in which patient has lost 2 inches in height. Note: patient was "light duty" restricted by Dr. Beverly Warren-Lynch and Dr. Perry Savage after her 5/11/95 back surgery in which the company refused to observe. Patient has reached maximum medical improvement/these injuries are 100% permanent and will have little or no change over the short term and deteriorating over the long term. She has also complied to physician request and sincerely tried to achieve medical improvement.....She was also terminated by her employer."

(Plaintiff Exhibit 19) On November 22, 2000, Dr. Oepen found that Tidwell was disabled and that he did "not foresee return to work." (Plaintiff Exhibit CT-18).

II

In Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989), the U.S. Supreme Court held that if a benefits plan gives the plan administrator or fiduciary discretionary authority to determine the eligibility for benefits and to construe the terms of the plan, the "abuse of discretion" standard applies when a court reviews the denial of benefits challenged under ERISA, section 502(a)(1)(B). Since Firestone, the Eleventh Circuit has applied the arbitrary and capricious standard in reviewing the denial o f benefits under ERISA plans. See Guy v. Southeastern Iron Workers' Welfare Fund, 877 F.2d 37, 38 (11th Cir. 1989); Jett v. Blue Cross - Blue Shield Inc., 890 F.2d 1137, 1138 (11th Cir. 1989).

A court's inquiry into whether a decision was arbitrary and capricious is limited to consideration of "the facts as known to the administrator at the time the decision was made." Jett, 890 F.2d at 1139.

Where a potential conflict of interest exists, as is the case in the present action, the Eleventh Circuit has established a variation of the arbitrary and capricious standard. First, a court determines "the legally correct interpretation of the disputed plan provisions," and then it evaluates "whether the fiduciary was arbitrary and capricious in adopting a different interpretation." Brown v. Blue Cross & Blue Shield, Inc., 898 F.2d 1556, 1570 (11th Cir. 1990).

If a fiduciary action under a possible conflict of interest "such as the EBCRC or "reviewing committee" correctly interprets the language of the plan, then a court proceeds no further under Brown. Presley v. Blue Cross-Blue Shield, 744 F. Supp. 1051, 1056-57 (N.D. Ala. 1998) (Nelson J.).

III

It is undisputed that the language of the STD Plan confers to the EBCRC discretionary authority, reviewable under the heightened arbitrary and capricious standard.

It is clear that the EBCRC correctly interpreted the language of the Plan. Plaintiff has not presented any contrary evidence. Based on its proper interpretation of the language of the Plan, the EBCRC overturned BellSouth's denial of STD benefits for a portion of the requested period. There is no evidence that Plaintiff was impeded in presenting any medical evidence to the EBCRC or that the fiduciary failed to consider any evidence presented to it.

Plaintiff's position is that the EBCRC and the Court should consider evidence not presented to the fiduciary. Such is not the Law. Plaintiff has failed to show any arbitrariness or capriciousness in the decision denying benefits. By separate order, summary judgment will be granted to BellSouth. Done this 30th day of June, 2001.
Signed by Chief U. S. District Judge U.W. Clemon

APPENDIX E

Summary and Final Judgment

Motion of Summary Judgment
Granted to Defendant/Respondent
Summary and Final Judgment
Entered on July 2, 2001
District Court Case Number 00-C-1197-S
United States District Court
The Northern District of Alabama
Chief United States District Judge U.W. Clemon
Docket Item # 30
Separate Order
Entered on July 2, 2001 and states:

Summary and Final Judgment

Based on the accompanying Memorandum Opinion, Summary Judgment is hereby entered in favor of the Defendant BellSouth Telecommunications, Inc. and against Plaintiff Caren Tidwell.

Final Judgment is accordingly entered against the Plaintiff.

The cost of this case are taxed as paid.

Done this 30th day of June, 2001.

Signed by
Chief United States District Judge U. W. Clemon

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS

STATUTES

Employee Retirement Income Security Act (ERISA)
29 U.S.C.§1001-1461

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28 U.S.C. § 1254 (1)
Title 28 U.S.C. Section 1254
Court of Appeals; Certiorari: Certified Questions
Cases in the courts of appeals may be reviewed by
the Supreme Court by the following methods:
(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

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29 U.S.C. § 1132(a)(1)(B)
29 U.S.C.§ 1132(a)(3)
ERISA Sections 502(a)(1)(B) and (a)(3)
29 U.S.C. § 1132(a)(1)(B)
Section 1132 - Civil Enforcement
(a) Persons empowered to bring a civil action
A civil action may be brought -
(1) by a participant or beneficiary -
B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
Employee Retirement Income Security Act,
29 U.S.C. § 1132(a)(3)
(3) by a participant, beneficiary, or fiduciary
(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or
(B) to obtain other appropriate equitable relief
(i) to redress such violations or

(ii) to enforce any provisions of this subchapter or the terms of the plan;

.....

29 U.S.C. § 1133. - Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall (2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim .

.....

Section 510 of ERISA, 29 U.S.C. § 1140

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act (29 U.S.C. 301 et seq.), or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

.....

29 U.S.C. § 1141 Coercive interference

It shall be unlawful for any person through the use of fraud, force, violence, or threat of the use of force or violence, to restrain, coerce, intimidate, or attempt to restrain, coerce, or intimidate any participant or beneficiary for the purpose of interfering with or preventing the exercise of any right to which he is or may become entitled under the plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act (29 U.S.C. 301 et seq.). Any person who willfully violates this section shall be fined $10,000 or imprisoned for not more than one year, or both

APPENDIX G

Godfrey v. BellSouth
No. 95-6480. (11th Cir. 1996) 14, 15

*This cited case involves this Respondent. The same decision makers in this case are the same decision makers in the Petition at hand. These "decisions" were also about the same time - This should automatically call this Respondent's credibility into question, thereby by Law, the Respondent being granted summary judgment should be reversed.

ERISA Sections 502(a)(1)(B) and (a)(3)
29 U.S.C. § 1132(a)(1)(B) and § 1132(a)(3).
ERISA Sections 502(a)(1)(B) and (a)(3),
29 U.S.C. § 1132(a)(1)(B) and (a)(3)
Section 510 of ERISA, 29 U.S.C. § 1140.

*Some provisions involved are lengthy, so their citations have been included in the appendix as allowed per your instructions. Since this case involves the same "self funded" "self administrated" "self policed" Plan Administrators, the entire case is in Appendix G App. 18 - for the Court's viewing.

United States Court of Appeals, Eleventh Circuit.
Godfrey v. BellSouth
No. 95-6480. (11th Cir. 1996) July 26, 1996.

Appeals from the United States District Court for the Northern District of Alabama. (No. CV94-C-1386-S), U.W. Clemon, Judge. Before CARNES, Circuit Judge, and FAY and GIBSON[*], Senior Circuit Judges. FAY, Senior Circuit Judge:

An employee of BellSouth Telecommunications ("BST") brought suit against the company to enforce the provisions of her sickness and disability benefit plans. The District Court found that the plaintiff was disabled under the terms of the plan contracts, and that the plan administrators had arbitrarily and capriciously rejected her claims. We affirm.

I. BACKGROUND

Carol Godfrey began working for BellSouth in 1963. By 1990 she had earned several promotions. However, in June of 1990 she became ill. Her family doctor referred her to several specialists, who diagnosed her with: fibromyalgia; a thirty degree angle of pressure on the spine; lumbar disc syndrome; rotator cuff disease; severe sciatic pain and sacral pain; chronic dorsal lumbar strain; and joint swelling pain. The District Court found that the evidence conclusively proved that her pain was severe and disabling.

Ms. Godfrey was treated with several very potent drugs which she had to take on a daily basis, including: Lorcet Plus, a narcotic pain medication whose main side effect is drowsiness; Flexeril, a muscle relaxer whose main side effect is drowsiness; and Donnatal, an anti- colonurgic medicine whose main side effect is blurred vision. In addition, she had to undergo regular physical therapy.

In June of 1990, when she first started to experience the debilitating pain, Ms. Godfrey submitted a claim for benefits under BST's Sickness and Accident Disability (SAD) Plan. The District Court found that she provided BST with more than ample evidence of her disability, including physician's certificates from at least four doctors. BellSouth's manager denied Sickness Benefits and the review committees denied Ms. Godfrey's appeals.

In January of 1991, BST informed Ms. Godfrey that she would have to return to work or be discharged. At that point, according to the District Court:

[w]ith a dependent son, the plaintiff had no real choice other than to dope herself up with the medications that had been prescribed for her and get in the car, contrary to medical advice, drive herself to work, and then work while under the influence of a combination of very potent drugs.

Despite the debilitating pain, Ms. Godfrey was physically able to show up for work on a fairly regular basis. However, the District Court found that on some days she simply could not get to work. Because of her sickness, her attendance record was the worst of any employee in the unit, and she was disciplined for her absences. Because she returned to work, however, she did not become eligible for benefits under the Long-Term Disability Plan (LTD), which requires the exhaustion of fifty- two weeks of disability benefits under the sickness plan.

Ms. Godfrey filed complaints of discrimination and harassment with BST in November of 1991 and January of 1992. In addition, she filed grievances with the union. On January 20, 1993, all of her complaints were denied, except BST reduced one of her suspensions by two days. She filed suit on May 5, 1994 in state court.

The case was removed to federal court. Godfrey amended her complaint to add a claim under ERISA, the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461. The District Court ruled that Godfrey was not entitled to extra- contractual or punitive damages under 29 U.S.C. § 1132(a)(1)(B), § 1132(a)(3), or § 1140. After a bench trial, the court found that Godfrey was disabled under the terms of the sickness and disability benefit plans from June of 1990 to October 1, 1993. The court issued an injunction ordering BST to comply with ERISA and pay Godfrey $58,300.50 in benefits. BST appealed the judgment. Godfrey cross-appealed the District Court's determination that she was not entitled to extra- contractual or punitive damages.

II. STANDARD OF REVIEW

We review conclusions of law *de novo* but do not disturb findings of fact unless they are clearly erroneous. *See U.S. v. Thomas*, 62 F.3d 1332, 1336 (11th Cir.1995), *cert. denied*, — U.S. —, 116 S.Ct. 1058, 134 L.Ed.2d 202 (1996). Equitable

remedies will not be disturbed unless the District Court abused its discretion or made an error of law, or unless the findings of fact are not supported by the evidence. *See Planned Parenthood Ass'n of Atlanta Area, Inc. v. Miller*, 934 F.2d 1462, 1471 (11th Cir.1991).

Where the administrator of an ERISA benefits plan has discretionary authority to determine eligibility for benefits, a court reviews that determination under the arbitrary and capricious standard. *Brown v. Blue Cross and Blue Shield of Alabama*, 898 F.2d 1556, 1559 (11th Cir.1990). However, such a determination is not entitled to as much deference where the administrator has a conflict of interest. *Id.* at 1566.

[A] wrong but apparently reasonable interpretation is arbitrary and capricious if it advances the conflicting interest of the fiduciary at the expense of the affected beneficiary or beneficiaries unless the fiduciary justifies the interpretation on the ground of its benefit to the class of all participants and beneficiaries.

Id. At 1566-67.

[T]he fiduciary's interpretation first must be "wrong" from the perspective of a de novo review ...

Id. at 1566, n. 12.

III. ANALYSIS

A. The District Court did not err when it found that Godfrey was denied benefits under the Sickness and Accident Disability Plan in violation of ERISA Sections 502(a)(1)(B) and (a)(3), 29 U.S.C. § 1132(a)(1)(B) and § 1132(a)(3).

Using the test outlined above, we review the decision in this case under the arbitrary and capricious standard. *Brown*, 898 F.2d at 1559. However, such a determination is not entitled

to as much deference if the administrator had a conflict of interest. *Brown,* 898 F.2d at 1566. In such a case, we first conduct a *de novo* review to decide if the determination was wrong. *Id.*

BST argues that there was no conflict of interest, even though BST self- administered the plan and paid benefits from its operating expenses. According to BST, it would have had to pay Godfrey regardless of the determination by the plan administrator; either it would have paid Godfrey benefits or it would have paid her wages. In addition, according to BST, it did not save the cost of a replacement worker because it did not hire a replacement worker when Godfrey was out, and it might not have hired one if she had been granted benefits. However, if BST granted benefits to Godfrey, it would have either had to hire a replacement worker or lose the services of an employee in that position. The BST plan administrators had a conflict of interest.

Because of this conflict of interest, BST's determination could be arbitrary and capricious even if it was only "a wrong but apparently reasonable interpretation." *Brown,* 898 F.2d at 1566. The District Court found that the determination was indeed wrong, and that Godfrey was disabled under the terms of the ERISA benefit plans.

Ms. Godfrey sought benefits under two benefit plans. In order to receive benefits under the first plan, the Sickness and Accident Disability Plan, a participant must fulfill five requirements. The only one that BST claimed that Godfrey did not meet was the requirement that the plan participant furnish satisfactory evidence of her disability. The plan did not specifically define disability, but paid benefits when a participant was "temporarily disabled from work by reason of sickness."

BST argues that this language required Godfrey to show that she had a loss of function which would prevent her from

doing her job duties. Thus BST's Medical Director considered that Ms. Godfrey was able to move her extremities without constraint despite the fusion in her spine. The plan administrators testified that they accepted the diagnoses of Godfrey's condition from her doctors, but, as one of BST's medical consultants stated, "pain alone does not substantiate disability."

The plan is designed to pay benefits when a participant is "disabled from work by reason of sickness." Nothing in the plan requires BST's narrow interpretation of the language. "Disabled from work" can mean more than physical paralysis or limited limb movement.

Dr. McLain, one of Godfrey's treating physicians, testified that fibromyalgia can be severely disabling and can only be diagnosed by an examination of the patient. The court found that BST's physicians arbitrarily rejected the clear medical evidence she submitted without even examining her themselves or seeking the treatment notes of her doctors. Moreover, they ignored the effects of the medication that Godfrey had to take on a daily basis due to her condition.

It seems to the court that the only rational explanation for the failure of the defendant's physicians to follow up on evidence which they did have and to ignore the effects of the medications that the plaintiff was taking is that *they knew that in fact the plaintiff was disabled* and following up leads and considering the effect of the medications would only confirm what any reasonable doctor would have already known.

Thus the court found that BST's wrong determination "advance[d] the conflicting interest of the fiduciary at the expense of the affected beneficiary." *Brown*, 898 F.2d at 1567. Because BST could not justify its determination "on the ground of its benefit to the class of all participants," *id.*, the denial of benefits was arbitrary and capricious and violated

ERISA Sections 502(a)(1)(B) and (a)(3), 29 U.S.C. § 1132(a)(1)(B) and (a)(3). The District Court determined that from June 15, 1990 until January 21, 1991, Ms. Godfrey was disabled and out of work and that she was entitled to benefits under the SAD plan for that time period. The record fully supports this finding.

B. The District Court did not err when it found that BST violated Section 510 of ERISA, 29 U.S.C. § 1140.

After BST arbitrarily and capriciously denied Godfrey benefits under the sickness plan, BST required the disabled plaintiff to return to work or lose her job. The District Court found that:

[w]ith a dependent son, the plaintiff had no real choice other than to dope herself up with the medications that had been prescribed for her and get in the car, contrary to medical advice, drive herself to work, and then work while under the influence of a combination of very potent drugs.

Thus the court found that although Godfrey was disabled under the terms of the sickness plan, she was physically able to show up at her place of employment. However, her attendance record was the worst of any employee in her unit due to her disability, and she was disciplined for her absences. Because she returned to work in January of 1991 and because thereafter she was suspended and threatened with discharge whenever she stayed home, she lost her eligibility for benefits under the SAD plan and she did not become eligible for benefits under the Long-Term Disability (LTD) Plan.

Section 510 of ERISA makes it:

unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled

under the provisions of an employee benefit plan, ... or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan.

29 U.S.C. § 1140.

Of course an employer may demand that an employee return to work after determining that the employee is not disabled, and then discipline that employee for unexcused absences. The employer does not violate ERISA Section 510 just because a court later determines that the employer's good faith disability determination was wrong. However, ERISA Section 510 does prohibit an employer from threatening to fire a disabled [1] employee *in order for the employer to* avoid paying further benefits.

In this case, the District Court specifically found: that BST threatened to discharge Godfrey if she stayed home and disciplined her when she did stay home, even though she had the right to stay home under the benefit plans; that BST did so, at least in part, in order to prevent Godfrey from becoming eligible for further benefits; and that from January 21, 1991 until October 1, 1993, Godfrey was disabled and BST unlawfully acted to prevent her from obtaining benefits under the SAD plan and from becoming eligible for benefits under the LTD plan. The record fully supports these findings.

BST argues that Godfrey's claim under Section 510 was barred by the two year statute of limitations.[2] BST threatened to discharge Godfrey in January of 1991 and she was suspended for excessive absenteeism in 1991, but she did not bring suit until May 5, 1994. Godfrey counters, however, that she had to exhaust any administrative remedies before she could bring suit, *see Springer v. Wal-Mart Associates' Group Health Plan*, 908 F.2d 897, 899 (11th Cir.1990), and so the statute of limitations did not begin to run until she did so on January 20, 1993.

Godfrey did file complaints of discrimination and harassment with BST in November of 1991 and January of 1992. In addition, she filed grievances with the union. On January 20, 1993, all of her complaints were denied, except BST reduced one of her suspensions by two days.

These administrative procedures were not specifically provided for in the benefit plans, and BST argues on appeal that Godfrey was not required to file an administrative appeal in this case. However, BST argued in its motion for summary judgment before the District Court that Godfrey had failed to exhaust her administrative remedies in regard to the Section 510 claim because her administrative complaint dealt only with the denial of benefits and not with any retaliation. BST argued in the District Court that Godfrey was required to seek administrative remedies before she could file this suit. Accepting such a position, the final action here was on January 20, 1993, and the suit was filed well within the statute of limitations. BST cannot raise for the first time on appeal the argument that Godfrey did not have to complain administratively in this case, *see FDIC v. Verex Assurance, Inc.*, 3 F.3d 391, 395 (11th Cir.1993), and so we must conclude that BST's final action was on January 20, 1993. The suit was filed within the statute of limitations.[3]

C. The District Court did not err in refusing to set off Godfrey's benefits award by the wages she received.

Although the District Court found that Godfrey was disabled, she did return to work on January 21, 1991 and received wages from that point on. Those wages would normally prevent her from receiving benefits under the SAD plan or the LTD plan, but because BST violated Section 510 of ERISA the District Court could order BST to pay benefits for that period. However, BST contends that those benefits should be offset by the wages that Godfrey was paid by BST. Those wages exceed the amount of benefits that Godfrey would have received, and so BST argues that even if it did

violate ERISA Sections 502 and 510, Godfrey is entitled to no relief.

Normally, of course, a disabled employee will not collect wages. In this case, however, the District Court found that Ms. Godfrey was disabled under the terms of the benefit plans, even though she was able to physically show up for work and earn wages. Under ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), the court has the power to grant equitable relief to redress violations of ERISA or violations of the benefit plan. In this case, BST arbitrarily and capriciously determined that Godfrey was not disabled, and threatened to fire her if she did not come back to work. The District Court found that Godfrey had no real choice but to return to work.

Because of BST's arbitrary and capricious determination, Godfrey had to show up for work while disabled under the terms of her benefit plan. BST's decision was not only wrong, but arbitrary and capricious. We cannot say that the District Court abused its decision when, under the equitable power of ERISA Section 502(a)(3), it refused to offset the benefits award by the amount Godfrey received in wages. BST was wrong, and the court did not have to give it credit for being wrong. If the benefits award was offset by her wages, then BST (and other companies that self- administer their ERISA plans) would have an incentive to do the same thing in the future: if the employer could threaten or cajole a disabled[4] employee into returning to work, it could obtain the rewards of having an employee in that position without hiring a replacement and without paying anything in benefits.[5]

D. The District Court did not err in holding that compensatory and punitive damages are not available under ERISA Sections 502 or 510, 29 U.S.C. § 1132 or § 1140.

In *Bishop v. Osborn Transportation, Inc.*, 838 F.2d 1173 (11th Cir.), *cert. denied*, 488 U.S. 832, 109 S.Ct. 90, 102 L.Ed.2d 66 (1988), this Court held that ERISA Sections 502(a)(1)(B), 502(a)(3), and 510, 29 U.S.C. § 1132(a)(1)(B), § 1132(a)(3), or § 1140, do not provide for extra- contractual or punitive damages. As this Court later noted in *McRae v. Seafarers' Welfare Plan*, 920 F.2d 819, 821 (11th Cir.1991), the holding in *Bishop* was not affected by *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990). The District Court did not err in holding that extra- contractual damages are not available in this case; a plan beneficiary can sue to enforce her rights under the plan and under ERISA, and for equitable relief, but not for punitive or compensatory damages.

IV. CONCLUSION

We conclude that the District Court applied the correct rules of law and the appropriate standards when it found that BST violated ERISA Sections 502 and 510, when it refused to offset the benefits award, and when it denied Godfrey extra-contractual damages. The judgment is AFFIRMED.

APPENDIX H

Marecek v. BellSouth
No. 93-6170. (11th Cir. 1996) 14, 15, 16
Appendix 29 - 39

*This cited case involves this Respondent. The same decision makers in this case are the same decision makers in the Petition at hand. These "decisions" were also about the same time - This should automatically call this Respondent's credibility into question, thereby by Law, the Respondent being granted summary judgment should be reversed. This case even states that this Respondent arbitrarily and capriciously denied Appellee's claim and reviewed the class members' claims. This Petitioner was one of the employee's that the 11th Circuit questions whether the review of the class members was fair. The abuse of this Respondent in this case led to them being the only employer that did not survive ANY standard of review when it reviewed its beneficiary's claims. This Petitioner is one of those beneficiaries.
§ 1132(a)(1)(B)
Employee Retirement Income Security Act (ERISA),
29 U.S.C. § 1001-1461,
BellSouth violated the Employee Retirement Income Security Act (ERISA)
29 U.S.C. § 1001-1461,
*Some provisions involved are lengthy, so their citations have been included in the appendix as allowed per your instructions. Since this case involves the same "self funded" "self administrated" "self policed" Plan Administrators, the entire case is in Appendix H for the Court's viewing.

United States Court of Appeals,
Eleventh Circuit. No. 93-6170.

Nancy H. MARECEK, Plaintiff-Appellee, v. BELLSOUTH SERVICES, INC., a corporation, BellSouth Services Sickness and Accident Disability Plan, BellSouth Services, Inc., as

Administrator for BellSouth Services Sickness and Accident Disability Plan, BellSouth Services Employee Assistance Program, BellSouth Services, Inc., as Administrator for BellSouth Services Employee Assistance Program, Defendants-Appellants.

April 10, 1995.<>

Appeal from the United States District Court for the Northern District of Alabama. (No. CV-91-C-0175-S), U. W. Clemon, Judge.

Before BIRCH and CARNES, Circuit Judges, and MORENO[*], District Judge.

MORENO, District Judge:

BellSouth Telecommunications, Inc., ("BellSouth") appeals the district court's ruling that BellSouth violated the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § § 1001-1461, when it arbitrarily and capriciously denied appellee's claim and reviewed the class members' claims. The district court awarded the appellee, Nancy H. Marecek, benefits and required the claims of the class be evaluated by BellSouth. We affirm the district court's rulings that Marecek was totally disabled and entitled to disability benefits, as well as its certification of the class.

BACKGROUND

In 1988, Marecek was a BellSouth employee and was covered by BellSouth's Services Sickness and Accident Disability Benefit Plan ("Plan"). The plan provides that a participant is qualified to receive sickness disability benefits "on account of physical disability to work by reason of sickness." The plan also offers accident disability benefits that contain two benefit classifications–one for total accident

disability and one for partial accident disability. The sickness disability benefits term does not specify whether the sickness disability benefits are for partial disability or total disability.

Marecek became addicted to the painkiller Fiorinal following a sinus operation and a hysterectomy in 1987. In May 1988, Marecek's treating physician diagnosed her as having a "major depressive disorder." BellSouth's consulting psychiatrist examined her and found that she was too depressed to perform her job adequately. Marecek took sick leave on May 26, 1988, and began receiving sickness disability benefits on June 2, 1988.

BellSouth authorized sickness disability benefits to continue until July 31, 1988. Marecek was to return to work on August 1, 1988. However, Marecek only worked for two hours on August 1, 1988, and cried the entire time. Marecek told BellSouth that she was not ready to return to work and that she wanted to know her options. According to BellSouth's records, she was informed that she would need to submit medical evidence from her physician for continued disability benefits.

On August 12, 1988, BellSouth received a physician certificate from Dr. Clarence McDanal, Marecek's physician. The certificate indicated that Marecek was suffering from adjustment disorder with mixed emotional features and from the side effects of Xanax medication. It also set the "estimated date" of Marecek's return to be "approximately September 19, 1988." BellSouth reinstated Marecek's sickness disability benefits until September 19, 1988 and ordered Marecek to return to work on September 19, 1988.

On September 16, 1988, Dr. McDanal recommended in a physician certificate that Marecek only work for "one- half time for at least a month" and warned of the "side effects to medication." Marecek did not feel able to return to work on

September 19, 1988, and requested use of her vacation days. BellSouth denied the request. Marecek's benefits ended on September 19, 1988 and she returned to work that day.

During her first day, Marecek was confused, angry, and unable to do her work. Marecek returned the next day, but resigned, stating "I cannot perform my duties in this job." Marecek's husband drove her home because she was unable to operate a car.

Marecek filed a disability claim with BellSouth on November 9, 1988. In January, Marecek entered an in- resident treatment program for her Fiorinal dependency. Dr. Jack White, who treated Marecek, advised BellSouth of Marecek's condition in a February 2, 1989 letter:

[Marecek] has been averaging 8-10 Fiorinal and Fioricet tablets per day since [her surgeries in 1987] ... In effect at the time the lady resigned her job in September of 1988, she was taking 4mg. of Xanax daily, 100 mg. Norpramin at bedtime, and 8-10 Fiorinal or Fioricet tablets daily. It is no wonder to me that she had difficulty concentrating and performing her job. She certainly was drug effected and in my opinion probably not able to make very rational decisions. With the information available to them at the time, I certainly understand why the physicians caring for Ms. Marecek made their decisions and agreed with her decision to resign. I do not believe they would have done so knowing that she was taking the Fiorinal and Fioricet in addition to the other medications mentioned.

BellSouth acknowledged that it considered Dr. White's letter, as well as Dr. McDanal's March 29, 1989 letter indicating that medication "greatly influenced" Marecek's problems.

Dr. Wood Herren, who was BellSouth's Medical Director and who evaluated medical evidence in benefits cases to recommend action on a claim, was present during

BellSouth's review of Marecek's case. Mr. F.W. Brice, the head of the department in which Marecek worked, was also present. On August 10, 1988, Dr. Herren called Brice. According to Dr. Herren's notes in Marecek's claim file, Brice, who had not seen Marecek since May 26, 1988, said "... the whole employee body is in support of ... suspension of benefits." Dr. Herren wrote in his notes that Brice's comments were "supportive of the medical- benefits decision to suspend benefits" because "the people in the workplace agreed that this employee (Marecek) was not sick." Dr. Herren stated that he believed that it was "hard to separate medical evidence from other things such as job performance, and absenteeism, and a whole bunch of other things which aren't really part of the medical records." Based at least in part on his conversation with Brice, Dr. Herren believed that Marecek was able to make rationale decisions in mid-September 1988.

However, Dr. Herren also noted that Marecek's consulting psychiatrist suggested to him that Marecek "has only been through "detox' and is no way ready to return to work and will need one- two years for recovery." After Dr. Herren received the diagnosis of Dr. White, Dr. Herren stated that "this lady will not be a satisfactory employee if reinstated. However, if top management wishes to take the risk it should be with full disclosure of this file."

During the review of Marecek's claim, BellSouth found that "[a]lthough Ms. Marecek was treated for other conditions after her resignation, these conditions were not disabling at the time of her resignation and therefore, do not qualify for sickness disability benefits under the Sickness and Accident Disability Benefit Plan." BellSouth finally denied Marecek's claim on May 4, 1989.

ANALYSIS

BellSouth presents two challenges to the district court's judgment. BellSouth contends that it correctly denied benefits to Marecek. BellSouth also alleges that the district court improperly certified a class action.

Standard of Review for Plan Interpretations

ERISA does not provide the standard to review decisions of a plan administrator or fiduciary.[1] *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 109, 109 S.Ct. 948, 953, 103 L.Ed.2d 80 (1989). Instead, the United States Supreme Court in *Firestone* established a spectrum of standards:

> a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.... Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a "facto[r] in determining whether there is an abuse of discretion." Restatement (Second) of Trusts § 187, Comment d (1959).

Firestone, 489 U.S. at 115, 109 S.Ct. at 957.

We apply the *Firestone* range of standards to interpretations of ambiguous plan provisions. *Brown v. Blue Cross & Blue Shield*, 898 F.2d 1556-68 (11th Cir.1990); *Newell v. Prudential Ins. Co. of Am.*, 904 F.2d 644, 650 (11th Cir.1990). Acknowledging the standards of review set forth in *Firestone*, this Court in *Brown* crafted an additional, more stringent standard of review for circumstances where the decisionmaker suffers a conflict of interest. *Brown*, 898 F.2d at 1566; *Newell*, 904 F.2d at 651. Therefore, we have three standards of review for plan interpretations: (1) *de novo*, applicable where the plan administrator is not afforded discretion; (2) arbitrary and capricious where the plan

administrator possesses discretion; and (3) heightened arbitrary and capricious where there is a conflict of interest.

BellSouth's Interpretation of the Plan

BellSouth argues on appeal that this case involves both a plan interpretation and a factual finding. Having briefly addressed the standards of review for plan interpretations, we first decide whether BellSouth correctly interpreted the plan. Primarily, the parties dispute on appeal the meaning of "disability" for sickness disability benefits. BellSouth argues that the plan requires "total disability" for sickness disability benefits.

The plan does not specify whether the claimant must be totally disabled and unable to work or whether the benefits accrue for a claimant that is partially disabled and can work part time. In contrast, the plan does provide for both total and partial accident disability benefits. BellSouth alleges that the plan requires total sickness disability, Marecek could work part time with her sickness disability, Marecek was not totally disabled from her sickness, and Marecek has no right to sickness disability. Hence, we must interpret whether BellSouth correctly interpreted "disability" to require total disability for sickness disability benefits.

We note that the "Summary of the Sickness and Accident Disability Benefit Plan" provides that sickness disability benefits begin on the eighth calendar day of absence from work. Notably, benefits do not begin on the eighth calendar day of part- time work that results from sickness. Further, a claimant may receive full pay for sickness disability benefits. If sickness disability benefits accrued for partially disabled employees, then a part- time, disabled worker could receive a windfall.

We conclude that the plan requires total disability for sickness disability benefits. We need not decide which

standard of review would apply in the instant case, as our conclusion would be the same under either of the three standards of review set forth in *Newell*. Accordingly, it is not necessary for us to address whether the plan administrator had discretion to interpret the plan terms and whether there was a conflict of interest.

Standard of Review for a Plan Administrator's Factual Findings

Having concluded that BellSouth correctly interpreted the plan, we now decide whether BellSouth erroneously concluded that Marecek was not totally disabled.

The Eleventh Circuit has not explicitly addressed the standard for reviewing the factual rulings of a plan administrator. *Maushardt v. Harris Corp.*, 855 F.Supp. 1240, 1243 (M.D.Fla.1994). The other circuits disagree on the appropriate standard of review of an administrator's factual decision. *Pierre v. Connecticut Gen. Life Ins. Co.*, 932 F.2d 1552 (5th Cir.), *cert. denied*, 502 U.S. 973, 112 S.Ct. 453, 116 L.Ed.2d 470 (1991) (White, J., dissenting from denial of certiorari) (recognizing that "a disagreement has developed in the Courts of Appeals concerning the standard of review to be applied when a benefits decision turns on the facts of the case, rather than the interpretation of the terms in the ERISA plan").

The Third and Fourth Circuit Courts of Appeal explicitly adopted the *Firestone* analysis to review findings of fact. *Luby v. Teamsters Health, Welfare and Pension Trust Funds*, 944 F.2d 1176 (3rd Cir.1991); *Reinking v. Philadelphia Am. Life Ins. Co.*, 910 F.2d 1210, 1213-14 (4th Cir.1990). In the First and Ninth Circuits, district courts have also used the *Firestone* standard to review both plan interpretations and factual findings. *Jorstad v. Connecticut Gen. Life Ins. Co.*, 844 F.Supp. 46, 54 (D.Mass.1994); *Peters v. Life Ins. Co. of N. Am.*, 816 F.Supp. 615, 617 (N.D.Cal.1993); *James v. Equicor, Inc.*, 791 F.Supp. 804, 807 (N.D.Calif.1992). The Sixth Circuit has not explicitly

decided the issue. *Luby* 944 F.2d at 1182 n. 4 (interpreting the Sixth Circuit in *Brown v. Ampco-Pittsburgh Corp.*, 876 F.2d 546, 551 (6th Cir.1989), as applying a *de novo* standard to plan administrator's factual determinations without addressing whether *Firestone* applies exclusively to plan interpretation). However, a district court in the Sixth Circuit applied the *Firestone* standard for the review of factual findings. *Donaldson v. Metro. Life Ins. Co.*, 812 F.Supp. 103, 105 n. 5 (E.D.Mich.1993). In addition, a district court in the Tenth Circuit used the *Firestone* approach. *Leahy v. The Bon, Inc.*, 801 F.Supp. 529, 538-39 (D.Utah 1992). *But see Torre v. Federated Mut. Ins. Co.*, 854 F.Supp. 790, 815-16 (D.Kan.1994) (recognizing that the Tenth Circuit has not resolved the standard of review).

BellSouth's Factual Findings

The district court set out the facts that support Marecek's right to sickness disability benefits and found that "plaintiff Marecek's claim was arbitrary and capriciously denied by the Plan's fiduciaries, and the claims of the plaintiff ... were not subjected to a full and fair review by the Plan's fiduciaries."

To support the denial of benefits, BellSouth argues that Marecek failed to present any written evidence that she was totally disabled. However, Marecek did provide letters that detailed her total disability; Marecek offered medical opinions that she was drug affected and could not make "rational decisions" on September 19, 1988.

BellSouth next argues that the existing medical evidence demonstrated that Marecek was not totally disabled. Dr.

McDanal recommended that Marecek's return on September 19, 1988 be with "limited duty." Limited duty might be partial disability but it is not total disability, according to BellSouth. While Dr. McDanal recommended limited duty,

we hold that his prediction does not conclusively establish whether Marecek was totally disabled on September 19, 1988, especially because he warned of "side effects to medication."

If BellSouth relied on Dr. Herren's conversation with Brice, then we find that the employees' opinion that Marecek was not ill is insufficient to rebut the medical opinions. Finally, in the appellate oral argument, BellSouth focused on Marecek's attendance on September 19 and 20, 1988 as evidence that she could work. However, Marecek "gave it a go" and her attempt to work does not forever bar her collection of sickness disability benefits. Therefore, BellSouth's factual findings and *post hoc* explanations are without merit. We find Marecek was totally disabled and is entitled to sickness disability benefits.

We decline to decide which standard of review should be applied for factual findings by a plan administrator as BellSouth's decision does not survive the most deferential standard of review. In other words, regardless of which standard of review would apply, we find that BellSouth incorrectly determined that Marecek was not totally disabled. Accordingly, we affirm the district court's finding that Marecek is entitled to total disability sickness benefits.

Class Certification

Finally, BellSouth challenged the district court's certification of a class because the potential class was not "so numerous that joinder of all members is impracticable," Fed.R.Civ.P. 23(a)(1), and because Marecek is not a typical class member, Fed.R.Civ.P. 23(a)(3). According to BellSouth, Marecek is not a member of the class because she is not entitled to benefits. We find sufficient evidence in support of the district court's finding that the numerosity requirement of Rule 23(a)(1) of the Federal Rules of Civil Procedure has been satisfied. In addition, we affirm the district court's finding that Marecek

qualified for total sickness disability benefits. Therefore, we dismiss BellSouth's typicality challenge to the class.

Judgment AFFIRMED.